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SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner respectfully prays the issuance of a Writ of Certiorari to review the decision of the Missouri Supreme Court issued in this cause.

OPINIONS BELOW

Petitioner, a law student attending the University of Missouri at Kansas City (UMKC) School of Law, commenced this action in the Circuit Court of Jackson County, Missouri, at Kansas City. In her petition she alleged that her rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution had been violated when she was denied the right by UMKC to apply for benefits from the Victor Wilson Scholarship, a very substantial scholarship fund, for the reason that she was a female and not a male. (This Petition is set out at A55.)

On motion of Respondents, the Circuit Court dismissed Petitioner's Second Amended Petition with prejudice for failure to state a claim upon which relief may be granted. (The Court's Order is set out at A59.)

Petitioner appealed to the Missouri Court of Appeals, Kansas City District, which Court in a unanimous decision reversed the Trial Court and held that Petitioner's petition did state a claim of sexual discrimination in violation of the Fourteenth Amendment. (This unpublished opinion is set out at A1).

Rather than allow the cause to proceed to trial, Respondents filed an Application to Transfer the action from the Court of Appeals to the Missouri Supreme Court. The court accepted transfer, and in a four to three decision, reinstated the judgment of the Trial Court holding that Petitioner had not been subjected to unlawful discrimination under the Fourteenth Amendment, and dismissed Petitioner's petition with prejudice. The opinion of the Missouri Supreme Court appears at *Shapiro* v. *Columbia Union National Bank and Trust Company*, 576 S.W.2d 310 (Mo. en banc 1978) and is set forth at A26 herein.

JURISDICTION

The judgment of the Missouri Supreme Court dismissing Petitioner's petition, was entered on December 18, 1978. Petitioner's Application for Rehearing was denied February 13, 1979. Since Petitioner's suit is based on her claim that her rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under 42 U.S.C.A. 1983 had been violated by Respondents, this Court has jurisdiction of the cause under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

Whether Petitioner's Second Amended Petition, which alleged the involvement of the State of Missouri (through the Curators of the University of Missouri, the President of the University of Missouri, the Chancellor of UMKC, and other employees and agents of UMKC) in the denial of her right to apply for a Victor Wilson Scholarship at UMKC because of her sex, and in the administration of the sexually discriminatory trust stated a claim upon which relief could be granted under the Equal Protection Clause and 42 U.S.C.A. 1983.

Further, whether the Supreme Court of Missouri, on the basis of the record before it (composed only of the pleadings, interrogatory answers and motions to dismiss) could properly find that the University was not so entertwined with the administration of the Trust as to rise to the level of "State action."

CONSTITUTION AND STATUTE

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

42 U.S.C.A. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citi-

zen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In April of 1972 Petitioner, a female, was a full time student attending UMKC School of Law. At that time, she applied for and made inquiry with regard to financial assistance from the Victor Wilson Scholarship at the Office of Financial Aid at UMKC. In a letter dated April 12, 1972, Petitioner was denied assistance from this scholarship because she was a woman.

The Victor Wilson Scholarship was established in the Last Will and Testament of Victor Wilson, who died on February 25, 1948, a resident of Kansas City, Missouri. Pertinent portions of the Will provided:

> "I give, devise and bequeath all the rest, residue and remainder of my property . . . to Union National Bank of Kansas City, Missouri, its successor or successors as Trustee . . . This Trust Fund is intended to be a Charitable Educational Fund for deserving Kansas City, Missouri boys to acquire a desired education in either the Yale University or the University of Kansas City, Missouri, and not as a benefit fund for either of the said Universities. The Trustee . . . shall use all of the rest of the net income derived from the property of the Trust Fund to assist one or more boys at the same time living in Kansas City, Missouri who possesses unusual ability or talent and who is financially unable to obtain a University education,

> to attend Yale University or the University of Kansas City, Missouri, whichever is requested by the Applicant. Such students shall be selected by judges appointed by the Yale Alumni of Kansas City, Missouri, and the University of Kansas City, Missouri, and approved by the Trustees of the said Fund. The Trustees shall discontinue supporting any student failing to make satisfactory grades while attending either of the said Universities. This said Trust Fund shall operate for a period of seventy-five (75) years after my death. At the expiration of the seventy-five (75) years the Trust shall terminate and all the property then remaining in the said Trust Fund shall be paid and distributed to the University of Kansas City, Missouri to be used by said University for building purposes or to the best advantage of said University. . ."

Respondent, Columbia Union National Bank and Trust Company, is the successor trustee to the Union National Bank named in the trust. The University of Kansas City has become a part of the State University system, and as a result of a court order in 1964, the words "University of Kansas City" whenever used in the trust are deemed to mean "University of Missouri at Kansas City", known as UMKC. Income from the trust is thus used to assist individuals (presently males) who live in Kansas City and who wish to attend UMKC or Yale University. The trust has a principal balance of over $4,000,000, and in 1973 over 200 UMKC students received benefits from the fund.

The state involvement of which Petitioner complains does not relate to the administration of the trust as it was originally created in 1946. At that time no public institution was involved with the trust. Petitioner's complaint concerns the involvement of the agents and employ-

ees of UMKC, a public university, the successor to Kansas City University named in the trust. Petitioner's Second Amended Petition alleged that the Curators, President, Chancellor and other agents and employees of UMKC ". . . have developed and continue to maintain with the support and acquiescence of the Defendant Trustee Bank, a process and procedure through which women, including Plaintiff, are systematically screened out and excluded from consideration and approval by Defendant Trustee Bank for financial aid from the Victor Wilson Scholarship solely on the basis of sex." (Paragraph 9, Petitioner's Second Amended Petition). Petitioner further alleged that she was denied an opportunity to apply for and be considered for financial aid from the Victor Wilson Scholarship by the State officials and University employees and that such denial was "done under color of and by virtue of state law and constitutes action of the State of Missouri within the terms of the Fourteenth Amendment of the United States Constitution and other applicable law." (Paragraph 12, Second Amended Petition). Petitioner alleged a violation of the Equal Protection Clause and 42 U.S.C.A. 1983. Petitioner prayed damages from the Trust Fund and prayed that the court apply the equitable doctrine of *cy pres* and substitute the words "students" or "individuals" for "boys" whenever used in the trust instrument.

The Trial Court dismissed Petitioner's Second Amended Petition with prejudice, holding that in spite of the allegations of Petitioner's Second Amended Petition there was no "state action" involved and therefore, the petition failed to state a claim upon which relief could be granted.

The Missouri Court of Appeals, in a unanimous decision, reversed, stating:

> "We are bound to conclude that the Victor Wilson Trust Fund has shed its private character, and that state involvement in the administration of the fund has become so significant as to subject the discriminatory provision of the trust to the equal protection clause of the Fourteenth Amendment. The plaintiff pleads the critical fact that the University [rather than by merely ministerial performance] did the decisive act in the selection of applicants for the Wilson Trust scholarship fund by the systematic exclusion of all applications by females, whatever their qualifications for benefits. This practice ensures state aid in the perpetuation of an otherwise private discrimination and thus comes under the protection of the Fourteenth Amendment." (A17).

Rather than allow Petitioner's cause to proceed to trial, Respondents filed an Application to Transfer the case from the Court of Appeals to the Missouri Supreme Court. The Missouri Supreme Court, in a four to three decision held that:

> ". . . we do not believe that the participation by the agents of the University of Missouri at Kansas City is of such a significant extent in any of its manifestations or is so entwined with private conduct that state action results." (A45).

The majority, therefore, reinstated the Trial Court's dismissal with prejudice of the petition.

Judges Donnelly and Seiler, dissenting, stated:

> "As recognized in the majority opinion, a resolution of the issues in this case is 'not an "easy task" because the courts are committed to both educational opportunity for all and to the encouragement of private charitable trusts.' However, despite the difficulty of the issues

and the importance of the facts for a proper resolution of the issues, the majority proceeds to find the facts and to determine the issues without affording plaintiff an opportunity to present the facts in evidence at a trial." (A49).

Judge Simeone also dissenting, stated:

"As to the principal issue—state action—I respectfully dissent. The thrust of the majority opinion is that the University of Missouri at Kansas City is not so entwined with the administration of the Victor Wilson Trust so as to constitute state action within the meaning of the Constitution or federal law. I disagree.

The majority opinion correctly traces the law and history of state action, but I believe that the involvement of the University now a public institution of such a prevailing nature so as to constitute that type of governmental entwinement with the administration of the Trust which calls into play the doctrine of state action." (A51).

Petitioner filed an Application for Rehearing before the Missouri Supreme Court which was denied, and Petitioner has timely filed this Petition for Writ of Certiorari in the United States Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

It is valuable to note that out of a total of ten Missouri appellate judges ruling on the question of "state action" in this case, only four found there was no state action. Four found there was, and two believed the evidence (yet unpresented) should be considered in order to decide the issue. Perhaps the divergence of opinion on the part of the justices resulted in part from the absence at the present of a controlling decision by this Court on a similar state acton question.

The state action question presented in this case does not affect Petitioner alone. It affects every public college and university in the country that is involved to any degree in the administration of scholarships or trusts created or operated for the benefit of a limited group: ethnic, religious, racial or sexual. The issue raised by Petitioner is not whether private scholarships of this nature should be allowed to exist—petitioner believes they should—but that at what point public institutions become so involved in these scholarships as to deprive them of their private character.

This Court has held that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 717, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). One test enunciated by this Court on the question of state action involves a consideration of the extent that the state "through any arrangement, management, funds, or property" is intertwined with the particular discrimination. *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401 at 1410, 3 L.Ed.2d 5 (1958). Consideration must be given to the impact of the official action which makes the discrimination possible in determining whether the state "has significantly involved

itself in invidious discriminations." *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967). The state's involvement in the particular discrimination may merely be "peripheral" or "only one of several cooperative forces" for there to be sufficient state action to create rights under the Equal Protection Clause. *United States* v. *Guest*, 383 U.S. 757, 86 S.Ct. 1170, 1177, 16 L.Ed.2d 239 (1966).

In spite of the fact that Petitioner had alleged state action in her petition and in spite of the fact that the case was before it on a motion to dismiss—without any evidence on the issue—the majority justices of the Missouri Supreme Court, on the basis of interrogatory answers, concluded that the University's employees simply made "tentative awards" and that the private Trustee made the final "approval," and therefore, there was no state action. Criticizing this approach to the case by the majority, Justice Donnelly in his dissent, joined in by Justice Seiler, stated:

> ". . . despite the difficulty of the issues and the importance of facts for a proper resolution of the issues, the majority proceeds to find the facts and to determine the issues without affording plaintiff an opportunity to present the facts in evidence at a trial." (A49).

As these Justices further point out, this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1693, 40 L.Ed.2d 90 (1974), had before it a case in the same procedural posture. Plaintiff had brought suit against certain state government officials for damages resulting from certain events occurring on the Kent State campus. The Defendants' motions to dismiss, claiming governmental immunity, were sustained. This Court reversed, stating:

> "These cases in their present posture present no occasion for a definitive exploration of the scope of immunity available. . .
>
> * * *

> . . . Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.
>
> We intimate no evaluation whatsoever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved." (94 S.Ct. at 1693).

Petitioner contends that she, too, is entitled to an opportunity to present evidence on the question of state action. The holding of the majority of the Missouri Supreme Court, denying her that right, flies in the face of this Court's pronouncement that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, supra. Petitioner has, therefore, been deprived of a right to show the extent to which the University is involved in the administration and handling of the Victor Wilson Trust. Petitioner believes that she could demonstrate that the University in fact makes all substantive judgments regarding the awarding of scholarships from the Fund, that the University's Office of Financial Aids and Awards and the University's employees perform virtually all of the work in connection with the administration of the scholarship. Petitioner believes that the extent of the University's involvement in the handling of the scholarship and the extent to which the scholarship is seen as a part of the University's scholarship program would be adequate to demonstrate state action and therefore, in spite of the fact that the trustee is a private bank, a violation of the Equal Protection Clause.

CONCLUSION

The nation's public colleges and universities need guidance on the extent to which they may allow themselves to be involved in the administration and handling of discriminatory scholarships and trusts. The present lack of any rulings by this Court on this question has caused uncertainty and divergence of judicial opinion in this case. This petitioner has alleged state action, but has been denied any opportunity to prove it by a court which has apparently "sifted the facts" without the benefit of evidence! In so doing, the court below ignored this Court's numerous declarations that only by considering all of the facts can the extent of the state involvement be illuminated, and the presence or absence of state action determined. Petitioner has been denied a basic, fundamental, federal Constitutional right to the equal protection of the laws. She earnestly prays that this Court grant her petition so that she may have a fair and adequate opportunity to present her cause and so that this area of the law may be clarified by the United States Supreme Court.

Respectfully submitted,

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APPENDIX

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD28222

MARILYN SHAPIRO,
Appellant,
vs.
COLUMBIA UNION NATIONAL BANK &
TRUST CO., et al.
Respondents.

Appeal From the Circuit Court of Jackson County
Honorable Alvin C. Randall, Judge

(Filed December 5, 1977)

Before Shangler, P.J., Welborn and Higgins, Special Judges.

This appeal comes from the dismissal of the second amended petition brought in two counts by Plaintiff Marilyn Shapiro, a law student in matriculation at the University of Missouri at Kansas City, against a number of interested defendants. Count I pleads that she was refused financial aid for educational purposes from the Victor Wilson Trust on the sole ground that she is female, and so was the subject of unlawful discrimination in violation of the equal protection, due process of law, and the privileges and immunities clauses of the Ninth and Fourteenth Amendments to the United States Constitution, Article 1, § 2 of the Missouri Constitution and the provisions of Title 42 U.S.C. § 1983 of the federal enactments. The plaintiff seeks money dam-

ages for the loss of financial aid from the fund. Count II asks the court to declare that the systematic exclusion of female students from the benefits of the scholarship fund be found to be an unconstitutional denial of the equal protection of the laws and that the court relieve the illegality of the provisions which direct that practice by the application of the doctrine of cy pres so that the Victor Wilson Trust be henceforth construed by the substitution of *students* or *individuals* for the word *boys* as presently appears in Article VIII of the Last Will and Testament of Victor Wilson.

Count I joins as defendants Columbia Union National Bank and Trust Company [Trustee Bank] as substitute successor trustee of the trust created under Article VIII of the Wilson testament, the Curators of the University of Missouri, the President of the University of Missouri and the Chancellor of the University of Missouri at Kansas City. Count II joins as defendants the Attorney General of Missouri and certain known and unknown heirs of the decedent testator-trustor Wilson.

The terms of Article VIII of the Wilson testament which creates the trust fund in contention provides:

> I give, devise and bequeath all the rest, residue and remainder of my property . . . to Union National Bank of Kansas City, Missouri, its successor or successors as Trustee. . . . This Trust Fund is intended to be a Charitable Educational Fund for deserving Kansas City, Missouri boys to acquire a desired education in either the Yale University or the University of Kansas City, Missouri, and not as a benefit fund for either of the said Universities. The Trustees . . . shall use all of the rest of the net income derived from the property of the Trust Fund to assist one or more boys at the same time living in Kansas City, Missouri, who possess unusual

> ability or talent and who is financially unable to obtain a University education, to attend Yale University or the University of Kansas City, Missouri, whichever is requested by the Applicant. Such students shall be selected by judges appointed by the Yale Alumni of Kansas City, Missouri, and the University of Kansas City, Missouri, and approved by the Trustees of said Fund. The trustees shall discontinue supporting any student failing to make satisfactory grades while attending either of said Universities.

The purpose of the trust by the express terms of the will is to provide scholarship funds to enable *boys* resident in Kansas City, Missouri of unusual ability or talent otherwise unable to afford a university education to attend Yale University[1] or the University of Kansas City. The will prescribes that the recipients of scholarship aid shall be selected by judges appointed by the Yale Alumni of Kansas City, Missouri, and the University of Kansas City, Missouri, and approved by the Trustees of the fund. The terms of the trust declare the intention that the funds are established as an educational charity and not as a benefit for either of the universities.[2]

The University of Kansas City became the University of Missouri at Kansas City and by judicial decree in 1964 the words *University of Kansas City* as used in the trust instrument were construed to mean *University of Missouri at Kansas City*.

The plaintiff pleads the trust provisions and that the University of Missouri at Kansas City has succeeded to the

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1. Yale University was not originally joined in the action but was allowed intervention as a party.

2. The petition alleges that Victor Wilson Trust had then a principal value of from four to five million dollars.

University of Kansas City as a judge in the selection process of student beneficiaries of the fund. The plaintiff pleads that, then a law student at UMKC and otherwise fully qualified, she applied for financial assistance from the fund but was informed by official UMKC letter [incorporated into the petition by reference] that she was denied scholarship assistance solely because she is female. She alleges further that the denial of benefits was the result of a procedure developed by the University of Missouri, UMKC, the Curators and other agents of the State of Missouri in cooperation of the Trustee Bank for the systematic exclusion of females from consideration for the Wilson scholarship funds on the sole basis of their female gender and, as such, was done under color of law and constitutes state action within the purposes of the Fourteenth Amendment to the United States Constitution.

The several defendants moved dismissal of the petition for failure to state a claim for relief because there was no state action, that the plaintiff had failed to show she was entitled to the funds, and there was no justiciable controversy suitable for declaratory judgment, and that 42 U.S.C. § 1983 does not allow a civil cause of action for a money claim to trust benefits. The defendants Curators and Attorney General also asserted that a § 1983 action may not be maintained in a state court and that state and public officials are immune to damages in such a proceeding.

The trial court dismissed the second amended petition for all the reasons ascribed in the motion of the defendants and for other separate reasons. The effect of the dismissal was to rule as a matter of law that the plaintiff failed to plead facts of sufficient state action in the administration of the trust to subject that procedure to the equal protection clauses of the state and federal constitutions, and so no cause of action was stated.

Our review of the dismissal of a petition without evidence allows the pleading its broadest intendment as a claim for relief. We treat all facts alleged as true [Hall v. American Oil Co., 504 S.W. 2d 313, 316[1-4] (Mo. App. 1973)], construe these allegations in a manner most favorable to the plaintiff [McDonough v. Alyward, 500 S.W. 2d 721, 722[1] (Mo. 1973)] and determine whether, so taken, the averments invoke substantial principles of law. Higday v. Nickolaus, 469 S.W. 2d 859, 862[1-3] (Mo. App. 1971). Within the context of these principles we decide whether the pleading shows the plaintiff is entitled to the funds she claims, and the cognate questions of law prescribed by this appeal.

The defendants Trustee Bank and Curators contend that the state action pleading raises questions of federal constitutional construction and so appellate jurisdiction vests of right in the Missouri Supreme Court. The defendant Attorney General, on the other hand, concedes our jurisdiction to decide the issues on appeal. The jurisdiction to decide an appeal, however, arises by constitution and not by concession, so we turn to decide that prior question.

I

Appellate Jurisdiction

Article 5, § 3 of the Missouri Constitution vests in the Missouri Supreme Court the exclusive appellate jurisdiction to construe the Constitution of the United States or of this State. A distinction is made for this purpose between construction and the application of a constitutional provision. Where the constitutional provision has been interpreted by the Supreme Court as to its proper effect, the task of construction is complete and all that remains is application of principle to a state of facts. Ewing v. City

of Springfield, 449 S.W. 2d 681, 684[2-4] (Mo. App. 1970). Thus, it is only when a constitutional provision is not clear that resort must be made to construction. E. B. Jones Motor Co. v. Industrial Commission, 298 S.W. 2d 407, 410[4, 5] (Mo. 1957).

The merits of this appeal turn on whether the administration of the fund constitutes state action and so is subject to the equal protection clause of the Fourteenth Amendment. It has been determined by the United States Supreme Court as a constitutional principle that "merely private conduct, however discriminatory or wrongful" does not come under the protection of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). That amendment protects only against state action: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." Thus it is only when the State power in any of its manifestations becomes significantly involved in private discriminations that the protection of the equal protection clause allows redress. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721 (1961). Thus, a charitable trust - otherwise private - which requires for administration some governmental act violates the equal protection rights of the Fourteenth Amendment if the beneficiaries are defined in terms of race, religion or other unreasonable classification. Evans v. Newton, 382 U.S. 296, 311 (1966).

These principles of constitutional construction have been given effect by our Supreme Court in First National Bank of Kansas City v. Danforth, 523 S.W. 2d 808 (1975) and so govern this review by application. Our appellate jurisdiction is not less certain because the United States

Supreme Court has never attempted "an infallible test" for state action, [Reitman v. Mulkey, 387 U.S. 369, 378 (1967)] nor because that determination depends in each case on "sifting facts and weighing circumstances." Burton v. Wilmington Parking Authority, *supra*, l.c. 722. The determination on this review remains one of constitutional application and not construction: whether the participation of the UMKC judges in the fund selection process constitutes state action so as to bring the beneficiaries under the equal protection of the laws.

II

State Court Jurisdiction of 42 U.S.C. § 1983 Actions

The defendant Attorney General contends that the Civil Rights Act of 1871 [42 U.S.C. § 1983] creates an uniquely federal remedy which a state court has no power to adjudicate. That premise has validity only if the congressional enactment has exclusively reserved enforcement of that law to the federal courts. Dowd Box Co. v. Courtney, 368 U.S. 502, 508[3,4] (1962). The earliest constitutionalists conceived of the state court systems as auxiliaries for the execution of the federal laws. Houston v. Moore, 18 U.S. 1, 25-27 (1820); Federalist Papers No. 82, Alexander Hamilton. This concept was reified in Article VI, § 2 which establishes the Constitution and the laws of the United States as the supreme law of the land and binds the judges in every state to them. Thus, the Supremacy Clause of the United States Constitution imposes the duty on a state forum to enforce substantive federal rights unless the congressional enactment has reserved that jurisdiction exclusively to the federal court. Testa v. Katt, 330 U.S. 386, 389 (1947); Fish v. Chicago, R.I. & P. Ry. Co., 263 Mo. 106, 172 S.W. 340, 344[2] (banc 1914).

The two federal statutes upon which the plaintiff asserts her claim are 42 U.S.C. § 1983 which creates the cause of action:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

And 28 U.S.C. § 1343 which vests jurisdiction:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress. . .

The Supreme Court of the United States has not directly spoken as to whether the Civil Rights Law - and particularly § 1343 - vests concurrent jurisdiction in the state courts to adjudicate the causes of action created by § 1983.[3] The state courts which have considered the

3. Three decisions of the United States Supreme Court by cogent implication hold that the § 1983 remedy of the Civil Rights Act of 1871 are available in the state court: Jones v. Hildebrant, ... U.S. ..... (1977); 97 S. Ct. 2283; Sullivan v. Little Hunting Park, 369 U.S. 229, 238 (1969); Aldinger v. Howard, 427 U.S. 1 (1976) especially dissent of Brennan,J., n. 17, l.c. 36.

question - save one [Chamberlain v. Brown, 442 S.W. 2d 248 (Tenn. 1969)] - are of unanimous opinion that the 1871 Act does not exclude their jurisdiction. This opinion rests on both the text of § 1343 which vests *original* - not *exclusive* - jurisdiction in the federal district courts, and the legislative history of the Civil Rights Act of 1871 and the successor statutes. Terry v. Kolski, 254 N.W. 2d 704 (Wis. 1977) and Brown v. Pitchess, 119 Cal. Rptr. 204, 531 P. 2d 772 (banc 1975). These authorities are persuasive that the *original jurisdiction* language of § 1343 enacted in 1964 amends and supercedes the *exclusive jurisdiction* language of the early Civil Rights Act. These considerations have led virtually all other state courts to conclude that the Act does not reserve exclusive jurisdiction to the federal courts, therefore, they come under the obligation of the supremacy clause to enforce the federal law. McClanahan v. Cochise College, 25 Ariz. App. 13, 540 P. 2d 744 (1975); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E. 2d 110 (1974); Silverman v. University of Colorado, 541 P. 2d 93 (Colo. App. 1975); Dudley v. Bell, 50 Mich. App. 678, 213 N.W. 2d 805 (1973); Clark v. Bond Stores, Inc., 41 A.D. 2d 620, 340 N.Y.S. 2d 847 (1973); Commonwealth ex rel. Saunders v. Creamer, 345 A. 2d 702 (Pa. 1975); Gomez v. Board of Education, etc., 85 N.M. 708, 516 P. 2d 679 (1973). See also, 82 Harv. L. R. 1488 (1969), l.c. 1486, n. 62 - Limiting the Section 1983 Action in the wake of Monroe v. Pape.

The contention of the Attorney General that a state court has no power to adjudicate a § 1983 claim rests on two decisions: Chamberlain v. Brown, 442 S.W. 2d 248 (Tenn. 1969) and Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964). These cases stand alone and contrary to all the decisions by the courts of each respective system which otherwise are unanimous that § 1343 allows concur-

rent to a state court to adjudicate the liabilities created by the Civil Rights Act.[4]

Chamberlain v. Brown rests on the premise [l.c. 251] that § 1983 was enacted in the wake of the Civil War to provide a federal remedy where the state remedy, though adequate in theory was not available in practice, and so evinces the congressional intent to avoid state court jurisdiction in such actions. There can be no doubt that § 1983 expresses the definite purpose to enforce the Fourteenth Amendment against the states for the benefit of the freed slaves and those others whose rights under the Constitution were impaired by state action [Monroe v. Pape, 365 U.S. 167, 180[5-7] (1961) and Mitchum v. Foster, 407 U.S. 225, 240[11-13] (1972)], but the grant of *original* and not *exclusive* jurisdiction to the federal court by the enactment of § 1343 in 1964 concludes the question. In cases which arise under the Constitution, laws and treaties of the United States, if exclusive jurisdiction in the United States courts be neither express nor implied, "the state courts have concurrent jurisdiction whenever, by their own Constitution, they are competent to take it." Claflin v. Houseman, 93 U.S. 130, 136 (1876); Ex parte Gounis, 304 Mo. 428, 263 S.W. 988, 990[2-7] (banc 1924).

Beauregard v. Wingard faced the court with an abstention question; the court observed that § 1983 created an entirely new federal right cognizable only in a court of the United States. That statement is dictum and rests on cases which do not support the conclusion.

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4. The federal decisions contra to Beauregard v. Wingard are: Long v. District of Columbia, 469 F. 2d 927, 937[13] (D.C. App. 1972); Luker v. Nelson, 341 F. Supp. 111, 116[6] (N.D.Ill. 1972); Davis v. Towe, 379 F. Supp. 536, 538[4] (E.D.Va. 1974), aff'd w.o. opinion, 526 F. 2d 588 (4th Cir. 1975); International Prisoners Union v. Rizzo, 356 F. Supp. 806, 810[4] (E.D.Pa. 1973); Bennun v. Board of Governors of Rutgers, 413 F. Supp. 1274, 1279[7-9] (D.N.J. 1976).

The argument of the Attorney General also cites Mitchum v. Foster, 407 U.S. 225 (1972). That case does not concern the problem of state court jurisdiction but only the right of a petitioner to enjoin under § 1983 a state court proceeding which threatens his constitutional rights. The language from the opinion - cited by the Attorney General - that § 1983 offered to private citizens [l.c. 239] "a uniquely federal remedy" merely iterates the purpose of that statute to allow a corrective to abuse by state action.

The circuit court is a court of general jurisdiction [Article 5, § 14 of the Missouri Constitution] and so, on these principles, was vested with concurrent jurisdiction in actions brought under § 1983. In the absence of valid excuse, therefore, the circuit court was required to adjudicate the petition brought by plaintiff Shapiro.

III.

Mootness

The defendants make the contention that the petition presents no justiciable controversy and is moot because plaintiff Shapiro has since completed her law course by graduation. They rely on DeFunis v. Odegaard, 416 U.S. 312 (1974) which refused to decide the challenge by a law student to the admissions policy of the school because the student was enrolled in his final semester and would complete his course regardless of decision by the court. The plaintiff seeks to bring her case within the "capable of repetition, yet evading review" standard for mootness applied in Roe v. Wade, 410 U.S. 113 (1972). In *Wade* a challenge to an abortion statute was not rendered moot by the termination of pregnancy of the petitioner before review by the United States Supreme Court because of the virtual impossibility that a case could reach that court

in nine months and also, because a woman often becomes pregnant more than once.

It may be, as the defendants suggest, that the possibility that plaintiff may choose to apply to the trust once again for graduate study is too remote to avoid mootness by the *Wade* standard. That does not conclude the matter, however, because the Missouri mootness rule - applicable here - does not preclude decision where the question is one of great public importance and involves public rights or interests under conditions that may readily recur. Lawyers Association of St. Louis v. City of St. Louis, 294 S.W. 2d 676, 680[1-3] (Mo. App. 1956); Triplett v. Grundy Electric Cooperative, Inc., 389 S.W. 2d 401, 408[11-13] (Mo. App. 1965). Also, a case otherwise moot will be decided for the authoritative guidance of public officers in situations probably to recur. Morrison v. State, 252 S.W. 2d 97 (Mo. App. 1952) was asked to determine whether a court may, over the objections of the parents, order a blood transfusion to preserve the life of an infant. The case was not considered moot for purposes of decision even though the transfusion was completed.

Similar considerations of policy require us to decide this appeal. The validity of the Victor Wilson Trust is a question of great public importance: the charity dispenses aid to needful students of the community from a fund of more than four million dollars. The case is certain to recur: both the university and the trustees are committed to comply with the direction of the testator to consider only males for the scholarship largesse. And determination is necessary also for the guidance of university officials who process the applications for financial aid from the trust. We decide this case, not because of the likelihood that plaintiff Shapiro will return to school, but because of the great public importance of this issue

and the certainty that it will recur as to other female applicants.

V.

Sufficiency of the Petition

The substantive question on this appeal[5] is whether the petition pleads a state of facts - that the university officials and an acquiescent trustee have developed a system to screen out female applicants for Wilson scholarship funds, because of their gender alone, and for that reason denied aid to plaintiff Shapiro - which, taken as true, constitutes state action within established constitutional principles.

Our decision proceeds on the basic premise that the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, § 2 of the Missouri Constitution do not prohibit private acts of discrimination unless significant state action is involved. That is to say [Evans v. Newton, 382 U.S. 296, 300 (1966):

> If a testator wanted to leave a school or center for use of one race only and in no way implicated the State in the supervision, control or management of that facility, we assume arguendo that no constitutional difficulty would be encountered.

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5. The motion to dismiss by each of the defendants contends also the technical lapse that the allegation of the petition that the plaintiff was "otherwise fully qualified to apply for and to receive benefits from the Victor Wilson Scholarship" does not adequately plead the requirements of the Trust that plaintiff "posses[es] unusual ability or talent and . . . is financially unable to obtain a University education. . ." We construe these pleadings in a manner most favorable to the pleader and find them sufficient to allege eligibility for the funds, but for her sex. The "unusual ability" requirement is for the determination of the selectors, so that the general pleading is sufficient, and her allegation that the denial of funds required her to engage part-time employment sufficiently proves, if true, her lack of personal funds for the cost of education.

What governmental act constitutes state action or turns a lawful private discrimination into an unlawful practice depends upon the particular circumstances. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

Where the state involvement is obvious - as where a private charity for a function normally regarded as public is administered in an invidiously discriminatory manner - the illegality under the Fourteenth Amendment is also obvious. Thus, in Evans v. Newton, *supra*, a trust created by a private will to maintain a public park for whites only administered by the city as trustee subjected the trust to the same Fourteenth Amendment restraints as bind the state. So, also in Commonwealth of Pennsylvania v. Board of Directors of City Trusts, etc., 353 U.S. 230 (1957), where a city as trustee administered a fund under a private will for a school to benefit poor white male orphans, the refusal to admit Negro applicants was discrimination by state action in violation of the Fourteenth Amendment.

State action of a nature to create rights under the equal protection clause can also result from less obvious, even peripheral, governmental involvement in conduct otherwise private - as where the activity "was only one of several co-operative forces leading to the constitutional violation". United States v. Guest, 383 U.S. 745, l.c. 755 (1966). In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) the court found state action supported the racially discriminatory policies of a private restaurant which leased space in a public parking ramp because: the restaurant was in a publicly owned building on public land dedicated to public use, the city paid for the building and maintained it, and the profits earned by the discrimination were essential to sustain the operation of the ramp.

See also Reitman v. Mulkey, 387 U.S. 369 (1967) the State of California.

The decisions show that *private action* becomes *state action* - and so subject to the restraints of the equal protection clause - when government "in any of its manifestations" participates "to some significant extent . . . through any arrangement, management, funds or property" in conduct otherwise private. Burton v. Wilmington Parking Authority, *supra*, l.c. 722.

The defendants argue that the participation by the state in the Victor Wilson Trust was minimal: that the trust at inception was purely private and immune to constitutional challenge - that the recipients were chosen by private judges, approved by a private trustee, for attendance at private schools. They contend that the circumstances which give rise to this appeal came about when UMKC officials were substituted for the private judge selectors of the beneficiaries of the Wilson fund - all long after Wilson died. They say that even as the trust is presently administered, the participation of UMKC is purely ministerial and if illegal, not by the intention of the testator but as the result of the action by the court which construed that UMKC was the successor to the University of Kansas City. It is actual state participation, however, and not the intention of the testator or the terms of the trust which constitutes the test of constitutionaliy.

The defendants rely on two cases for their argument that the present administration of the trust does not involve state action: Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) and First National Bank of Kansas City v. Danforth, 523 S.W. 2d 908 (Mo. 1975).

Irvis simply holds that exclusion from private club membership on the basis of race is not protected by the Fourteenth Amendment. Those facts do not bear here.

Danforth involved a trust under a private will for the maintenance and support of non-profit "Protestant Christian Hospitals . . . and/or . . . sick and infirm patients in said Hospitals, born of white parents in the United States of America". The Supreme Court found that the discriminatory provisions of the trust were not proscribed by the Fourteenth Amendment because [l.c. 821] "state action was not involved in the creation of the trust, nor is it required to carry out its terms". This result was supported by evidence that: the trust was created by a private will and funded privately, there was no limit on the use of funds once distributed to the beneficiaries, no public body was involved in the selection of beneficiaries, and payments flowed directly to individual beneficiaries from the trust. As a result, the court concluded that the trust neither sponsored nor enforced discrimination, nor was the public nature of the trust purpose alone sufficient to constitute state action. This decision is soundly based on the principle that the Constitution does not notice private discriminations. Unlike the hospital in *Danforth*, the University of Missouri [at Kansas City] is a creature of the state [§ 172.010, RSMo 1969] and as such plays a role in the selection of the trust beneficiaries through the financial aid office of UMKC.

The case which bears most closely to the facts pleaded by the petition of plaintiff Shapiro is Milford Trust Company v. Stabler, 301 A. 2d 534 (Del. Ch. Ct. 1973). It involved the construction of a trust designed to help white boys and girls receive an education. The trustee distributed the funds to applicants chosen by a Committee of Selection who were persons presently or previously in the state educational system. The local high schools completed the student application forms with information supplied by teachers and principals. The court found this

involvement in the application procedure and the service of public officers on the Selection Committee to constitute state action. In this case, as in the Victor Wilson Trust, the testator had not provided for any state role in the administration of the trust; rather the state participation arose from the decision of the trustees to enlist assistance from the public schools in the selection of beneficiaries. The court determined [l.c. 537] that actual state participation constitutes an independent test of constitutionality, quite apart from the actual provisions of the trust.

We are bound to conclude that the Victor Wilson Trust Fund has shed its private character, and that state involvement in the administration of the fund has become so significant as to subject the discriminatory provisions of the trust to the equal protection clause of the Fourteenth Amendment. The plaintiff pleads the critical fact that the university [rather than by merely ministerial performance] did the decisive act in the selection of applicants for the Wilson Trust scholarship funds by the systematic exclusion of all applications by females, whatever their qualifications for benefits. This practice ensures state aid in the perpetuation of an otherwise private discrimination and thus comes under the protection of the Fourteenth Amendment.

The Attorney General agrees that discriminations, based on race, religion, alienage or national origin are inherently suspect and so subject to strict judicial scrutiny. He contends, however, that the holding in Frontiero v. Richardson, 411 U.S. 677 which extends strict judicial scrutiny to "sex-based classifications" [l.c. 684] does not have the support of the majority of the Supreme Court but merely the concurrence, on that point, of four of the justices. He concludes, therefore, that the exclusion of female applicants from Wilson funds must be adjudged a discrim-

ination, if at all, on the traditional equal protection analysis that a governmental classification must be sustained if the "ground of difference [has] a fair and substantial relation to the object of the [action]." Reed v. Reed, 404 U.S. 71, l.c. 75 [1971]. To this we need only say that the Missouri Supreme Court understands *Frontiero* to render "[governmental] classifications based on sex constitutionally suspect, subject to close judicial scrutiny, and justifiable by an overriding [governmental] purpose." In re Interest of J.D.G., 498 S.W. 2d 786, l.c. 793 (Mo. 1973). Furthermore, by any traditional criterion, exclusion of a person from the benefits of a charitable scholarship aid trust because she is female issues from a premise no longer valid: that a university education is more necessary to the proper role of the male in contemporary life.

Count I of the petition states a cause of action for discrimination done to the plaintiff under color of law and is entitled to adjudication under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

VI.

Immunity of the University of Missouri Board of Curators Under 42 U.S.C. § 1983

A cause of action under 42 U.S.C. § 1983 must allege that the plaintiff was deprived of rights at the hands of a *person* who acts under color of law. The defendant Board of Curators of the University of Missouri contends that the Board is a public corporation, an arm of the State, and so not a *person* within § 1983.

It has now been settled authoritatively by the United States Supreme Court that a municipal corporation is not a *person* within § 1983 and so is not answerable for

damages in law [Monroe v. Pape, 365 U.S. 167 (1961)] or relief in equity [Kenosha v. Bruno, 412 U.S. 507 (1973)] under that provision of law. The question whether the immunity principles of *Pape* and *Bruno* extend to a state university was considered and resolved in Gay Lib v. University of Missouri, 416 F. Supp. 1350 (W.D. Mo. 1976). That court, on the analogy of those decisions, and on the authority of Prostrollo v. University of South Dakota, 507 F. 2d 775 (8th Cir. 1974) which applied *Pape* and *Bruno* to hold that the corporate board of governors of that university was not a *person* within § 1983, concluded that the University of Missouri Board of Curators was immune from such actions. The court in *Gay Lib* drew the likeness between a Missouri municipality, itself the creature of the state, and the University of Missouri, a body politic created by statute and governed by the Curators of the University of Missouri [§ 172.020 RSMo 1969], as a basis for decision. The court concluded, nevertheless, that a § 1983 cause of action remained against the individual defendants - university president and members of the Board of Curators.

This court, of course, has no duty to adopt as precedent the general declarations of a subordinate federal court; we are bound only by the supreme law of the land as given by the United States Supreme Court. Kraus v. Board of Education of City of Jennings, 492 S.W. 2d 783, 784[2] (Mo. 1973). We choose to follow and adopt the holdings in *Prostrollo* and *Gay Lib* because their sound reasons and careful expressions are entirely persuasive. We conclude, accordingly, that the dismissal of Count I against the Board of Curators should be affirmed on the ground that the Board is not a *person* within § 1983. A valid cause of action subsists against the defendants who remain.

VII.

Recovery of Damages Against The Trustee under 42 U.S.C. § 1983

The defendant Trustee contends separately that § 1983 does not intend to redress breach by a trustee of equitable duty to a trust beneficiary. The plaintiff, it is to be noted, describes her claim for damages - at least in part - an equitable cause of action for money she would have received from the trust but for the discriminatory conduct of the Trustee.

The relief available under § 1983 is broad and varied. International Prisoners' Union v. Rizzo, 356 F. Supp. 806 (E.D. Pa. 1973). The case cited by the Trustee [Siegel v. Ragen, 180 F. 2d 785 (7th Cir. 1950) does not support its position. In that case two inmates brought suit under the Civil Rights Act against the warden of a state prison on the allegation that the warden had mismanaged the prisoner trust fund. It was in response to that contention that the court held the Act did not remedy breach by a trustee of his equitable duty to a trust beneficiary [l.c. 789]. That holding - made at a time when the law did not yet recognize prisoner rights - merely expresses the principle that in the absence of unlawful state action no cause is made out under the Civil Rights Act.

The present case, in any event, does not involve breach of fiduciary duty; the challenge is not failure of faithful performance of the trust terms, but that an otherwise lawful administration of a private trust has become unlawful by the involvement of state action. If this be proved, and if the plaintiff show she was otherwise qualified but was rejected for reason of gender, she is entitled to damages. Her recovery is not damages in the traditional sense but an equitable repayment for educational

expenditures brought on by illegal discrimination. Harkless v. Sweeny Independent School District, 427 F. 2d 319, 324 (5th Cir. 1970); Gieringer v. Center School District No. 58, 477 F. 2d 1164, 1167[3] (8th Cir. 1973).

VIII.

The Declaratory Judgment

We have determined that Count II was not rendered moot by the conceded fact that plaintiff has since completed her law course by graduation from UMKC. We consider it a matter of unusual public interest that, if the administration of the Wilson fund be proved illegal as pleaded by Count I, the suitability of cy pres - or other alternative equitable relief sought by Count II to relieve the illegality - also be decided. Since Count I effectively proves Count II, our decision as to the one but not the other would present the anomaly of an illegality adjudicated, certain to recur, but unalleviated.

In simple terms, Count II seeks a declaration that the refusal to permit application by plaintiff for Wilson scholarship funds in accordance with the terms of the will solely because she is female denies her the equal protection of the laws in violation of the Fourteenth Amendment. To remedy that illegality the plaintiff asks the court to apply cy pres to construe the Victor Wilson Trust by the substitution of the word *students* or *individuals* for the word *boys* in Article VIII of the will.

It is a pre-eminent function of equity to aid the enforcement and administration of a trust by such decrees as will accomplish the intent of the settlor as to the dispositions to be made and the means to be used - that is, as to the purpose and administration of the trust. In this exercise of jurisdiction the court treats a charitable trust

as a favorite of equity and seeks to validate the gift by the most liberal methods the nature of the case admits. Burrier v. Jones, 338 Mo. 679, 92 S.W. 2d 885, 887[7] (banc 1936). The jurisdiction of equity to enforce a charitable trust includes the power to remodel its objectives or to amend the machinery of administration. The first describes the principle of cy pres, and the second the principle of deviation. 2 Restatement of Trusts 2d § 381. Because the essential question in either case is whether circumstances not foreseen by the settlor threaten fulfillment of the charity so as to warrant a court of equity to enforce and protect the charitable trusts, the courts do not always maintain the fastidious distinction these principles import. [e.g., Bank of Delaware v. Buckson, 255 A. 2d 710, 717[7] (Ct. of Ch. Del. 1969)].

The definition is clearly drawn in Bogert, Law of Trusts and Trustees § 394 (2d ed.) and adopted by our Supreme Court in Reed v. Eagleton, 384 S.W. 2d 578, 585 (Mo. 1964):

> Under [cy pres] where the charitable trust purpose has become impossible or impracticable of accomplishment the court may alter the objective of the trust by substituting another trust purpose which it deems to be nearly as possible like that of the settlor.
>
> . . .
>
> The court possesses a second important power, namely, that of changing, or permitting the trustee to change, the methods of administration set forth in the trust instrument, when this is deemed necessary or highly desirable in order to enable the trustee to perform the trust. This is called the power of the court to sanction deviation from the terms of the trust.

The basic delineation between them is, therefore, that cy pres alters the *purpose* of the trust whereas deviation only amends the method of *administration*. The exercise of either power becomes available when compliance with the the terms of the trust becomes impossible, illegal or otherwise impracticable.. Reed v. Eagleton, *supra*, l.c. 585.

It is evident that the dominant purpose of the Victor Wilson Trust is to provide funds for the private education of needful boys of unusual ability. It was a purpose lawful at inception and so it would have remained, had the private character of the charity been maintained. The private purpose becomes a public purpose, however, when the University of Kansas City was brought into the state university system as UMKC in 1963 and that public school was substituted for the private school by court decree as the selector of the trust beneficiaries. As a result, what was a wholly personal and legitimate choice of beneficiary became a state-sponsored discrimination subject to the ban of the equal protection clause.

The plaintiff Shapiro suggests that equity employ the cy pres power to restore the trust to a licit purpose by the substitution of *students* or *individuals* for *boys* in the will. That is, she would displace one trust purpose for another. The proposed remedy is too drastic: the state action which brings about the illegality is in the administration of the fund and not the intended purpose of the trust. The trust itself can be insulated from governmental action by the mere removal of UMKC from the selection of beneficiary process.

It is a sound rule of equity jurisdiction over trusts that "where there is a conflict between a dispositive provision and an administrative direction the latter [gives] way". Bogert, Trusts and Trustees § 561 (2d ed.). The

sanction of the original trust purpose to give scholarship aid to talented boys has been subverted by a circumstance unforeseen by the settlor - the involvement of government in the administration of the trust by the succession of UMKC as the judge of beneficiaries - and unless that mechanism is corrected, the main objective of the trust to limit benefits to boys will be frustrated by the necessity to remodel the trust to a lawful purpose by cy pres to remove the discriminatory limitation of beneficiary.

We conclude that should the evidence prove the state action the petition pleads, the trial court as chancellor in equity should declare that Article VIII of the will be construed to substitute for UMKC the Trustees or their appointees as judges to select the student beneficiaries of scholarship aid according to the terms of the trust.

This remedy by deviation has been sanctioned in principle for cases where by insulation of the charitable trust from state action the wholly private original purpose of the trust, otherwise discriminatory, can be restored to legality. Thus, in Evans v. Newton, 382 U.S. 398 (1966) the appointment of a private trustee to manage a park given to the city for use by whites only did not remove the state character from that inherently municipal activity. And in the Girard College cases for poor white male orphans [Pennsylvania v. Board of Directors of City Trusts, etc., 353 U.S. 230 (1957); In re Girard Trusteeship, 391 Pa. 434, 138 A. 2d 844 (1958); Commonwealth of Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967); Commonwealth of Pennsylvania v. Brown, 392 F. 2d 120 (3rd Cir. 1968)] the court concluded that the appointment of private trustees to replace the City of Philadelphia in administration of the trust did not allay the momentum of more than a hundred years of direct state involvement which "institutionaliz[ed] . . . Girard College as a governmentally sanctioned center of racial bias." 270 F. Supp. at 790[11].

The impediments to the removal of the state involvement which beset *Evans* and *Girard* are not present. Here there was no original state involvement - UMKC was not mentioned in the original trust instrument and the trust operated wholly privately from 1948 to 1964. Nor is the selection process for scholarship funds beneficiaries an inherently governmental activity as in *Evans* v. *Newton* nor is the Victor Wilson Trust associated in the public mind with government as in *Girard*. Nor is there need for a substitute trustee to separate the activity of the trust from state action for the state has never, in any of its manifestations, been trustee. All that is needed to restore the original trust objective to legality is to remove the state participation in the administration of the trust. Since the illegality was insinuated into the conduct of the trust by court action, it is seemly that the court should now redeem the trust to its original lawful purpose.

The cause is reversed and remanded with directions to reinstate Count I and Count II of the petition, and for dismissal of the petition against the defendant Board of Curators. The costs are assessed against all the defendants except the Board of Curators.

All concur.

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Charles Shangler, Presiding Judge

Marilyn SHAPIRO, Plaintiff-Appellant,

v.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY et al.,
Defendants-Respondents.

No. 60561.

Supreme Court of Missouri,
En Banc,

Dec. 18, 1978.

Rehearing Denied Feb. 13, 1979.

Ann Mesle Whittier, Steven J. Borel, Kansas City, for plaintiff-appellant.

John C. Danforth, Atty. Gen., B. J. Jones, Asst. Atty. Gen., Jefferson City, Guy A. Magruder, Jr., Kansas City, Jackson A. Wright, Columbia, Maurice O'Sullivan, Kansas City, for defendants-respondents.

PER CURIAM.

I.

This case is one of first impression in Missouri. It involves the administration of a private trust to provide scholarship funds for the benefit of "deserving Kansas City Missouri boys" to attend the University of Kansas City at the time of establishment of the trust a private university. After the establishment of the trust and subsequent to the settlor's death, the University became part of the University of Missouri. The trust excludes women.

The issue confronting us is whether the University is so entwined with the administration of the trust so as to

rise to the level of "state action" thus constituting discrimination against women.

We hold under the unique circumstances of this case that by sifting all the facts and circumstances there is not significant "state action" involved so as to be violative of the Equal Protection clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C.A., § 1983 and hence affirm the judgment of the trial court dismissing plaintiff's second amended petition. As to V., infra, we adopt portions of the opinion of Shangler, J., of the Kansas City District without quotation marks.

II.

This case involves an appeal from an order of the circuit court dismissing the second amended petition brought in two counts by plaintiff, Marilyn Shapiro, who was a law student at the University of Missouri at Kansas City. The second amended petition was filed by Ms. Shapiro against a number of defendants including Columbia Union National Bank and Trust Company (Trustee), the Board of Curators of the University of Missouri and the Attorney General alleging that she was denied the opportunity to apply for and be considered for financial aid from the charitable trust established by Mr. Victor Wilson to assist resident Kansas City "boys" who possess unusual ability or talent and who are financially unable to obtain a university education. Count I sought money damages for the loss of financial aid from the scholarship fund and Count II prayed the court to declare the exclusion of women from the benefits of the fund to be unconstitutional and to relieve the illegality by the application of the doctrine of cy pres.

[1] The trial court dismissed the second amended petition for failure to state a claim. Plaintiff appealed to

the Court of Appeals, Kansas City District which reversed and reinstated the petition as to all defendants except the Board of Curators of the University. We granted applications to transfer. We now decide the case as an original appeal pursuant to the provisions of Art. V, § 10, Mo.Const., and Rule 83.03. Our review of the dismissal of the petition allows the pleading its broadest intendment, we treat all facts alleged as true, construe the allegations favorably to the plaintiff and determine whether the averments invoke principles of substantive law. *Sisters of St. Mary's* v. *Campbell*, 511 S.W.2d 141, 145 (Mo.App.1974).

III.

On February 2, 1948, Mr. Victor Wilson, a wealthy unmarried man, made his last will and testament. Insofar as pertinent, Mr. Wilson's will provided in Article VIII:

> "I give, devise and bequeath all the rest, residue and remainder of my property and estate of every kind and character, personal and mixed . . . belonging to me at the time of my death, . . . to Union National Bank of Kansas City, Missouri, its successor[1] or successors, as Trustee. The Trustee shall have the sole legal and equitable title to all the property held by it in trust and shall have power to invest, reinvest, manage and control all the property to the best of its ability . . . . *This trust fund is intended to be a Charitable Educational Fund for deserving Kansas City, Missouri boys to acquire a desired education in either Yale University[2] or the University of Kansas City, Missouri,*

1. On or about December 10, 1969, by judicial decree the defendant Columbia Union National Bank and Trust Company was named successor trustee.

2. Yale University was not originally joined as a party but was allowed to intervene. After the decision of the trial court, Yale appealed to the Court of Appeals but later withdrew its appeal.

> *and not as a benefit fund for either of the said universities.* The Trustee shall be compensated for its services in accordance with its regular schedule of fees and after deducting the said Trustee fees and other necessary expenses incurred in the management of the Trust Fund, shall *use all of the rest of the net income derived from the property of the Trust Fund to assist one or more boys at the same time living in Kansas City, Missouri, who possess unusual ability or talent and who is financially unable to obtain a university education to attend Yale University or the University of Kansas City, Missouri, whichever is requested by the applicant. Such students shall be selected by judges appointed by the Yale Alumni of Kansas City, Missouri, and the University of Kansas City, Missouri, and approved by the Trustee of said Fund.* The Trustees shall discontinue supporting any student failing to make satisfactory grades while attending either of said Universities . . . ." (Emphasis added.)

A few days after making his will, on February 25, 1948, Mr. Wilson died. The will was admitted to probate March 29, 1948.

The market value of the assets comprising the principal of the Victor Wilson trust exceeded $4,000,000, and over 200 boys each year were given funds, many over $1,000.00 each for several years between 1970 and 1974.

Plaintiff-appellant, Marilyn Shapiro, first filed an original and then a first amended petition in one count. After the first amended petition was filed, the plaintiff forwarded a number of interrogatories to the Bank and to the Board of Curators. The Board's answers showed certain additional facts.

After the answers to the interrogatories were filed, the trustee and the Attorney General moved to dismiss. The trial court sustained the motions and the first amended petition was dismissed for failure to state a claim.[3] In its memorandum, the court noted that the trust instrument was amended by court order to substitute the University of Missouri at Kansas City. The trial court's memorandum concluded that "Mr. Wilson had a right to limit his charity to males. He did so. And it is clear that the court does not have the power or the right to arbitrarily thwart his intentions."

Plaintiff then filed a second amended petition on September 25, 1974. This petition is the subject of this controversy. The second amended petition was in two counts. The petition named as defendants the Columbia Union Bank, the President of the University of Missouri, the chancellor of the University of Missouri at Kansas City, the Board of Curators, two beneficiaries of the will and insofar as the second count is concerned the Attorney General.

Count I of the second amended petition after certain preliminary and formal matters alleged that (1) the Victor Wilson Trust is a "public charitable trust" which provides funds for a scholarship generally known as the "Victor Wilson Scholarship", (2) that in July, 1964, by order of

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3. The trial court stated in its memorandum that while the language in the petition is not clear, she is alleging that the language of the trust instrument provides that females shall be beneficiaries of the trust but if the court should find the will excluding women to be illegal that it should save the trust and invoke equitable powers to change "boys" to "students". The court stated that the language of the trust makes it clear that the beneficiaries are to be boys. There is no state action sufficient to render the administration of the trust illegal. Even though the trust refers to the "selection" of recipients by the University of Kansas City, it is clear that this is intended to be only a preliminary screening process and that the boys must be approved by the trustee.

the court the "University of Kansas City" when used in the Trust is to mean the "University of Missouri at Kansas City" with respect to the use of funds,—"[t]hus, income from the principal of the Victor Wilson Trust is so used to provide financial assistance to 'individuals' who live in Kansas City, . . .", (3) that Article VII of the trust provides funds to assist "one or more boys" "who possess unusual ability or talent" and who are financially unable to obtain a University education and that such students shall be "selected" by judges appointed by alumni of the University of Kansas City and "approved" by the trustee, (4) that the Curators, President and Chancellor "have developed and continue to maintain with the support and acquiescence of the . . . Bank, a process and procedure through which women, including Plaintiff, are systematically screened out and excluded from consideration and approval" by the bank from the Victor Wilson Scholarship "solely on the basis of sex," (5) on April 1, 1972, plaintiff applied for financial assistance from the Trust from the Financial Aid Office at the University of Missouri and was informed that under the present system the Victor Wilson Scholarship is for men only so that she was denied assistance from the scholarship fund for the "sole reason" she is a woman, (6) that on April 1, 1972, she was a full-time student at the University of Missouri and was otherwise fully qualified to apply for and receive benefits from the scholarship, (7) denial to plaintiff of the opportunity to "apply for, be considered for, and be approved for financial aid" from the scholarship by the President of the University, the chancellor and the Board and their agents—all agents of the State is done under "color of and by virtue of state law" and constitutes action by the state within the terms of the Fourteenth Amendment, (8) the refusal to permit plaintiff to apply for and be considered for, and approved for financial aid is a denial of her rights guar-

anteed under the Federal and State Constitutions[4] and by 42 U.S.C.A. § 1983 because she has been denied equal protection under the law and the privileges and immunities guaranteed to all citizens.

In Count I she prayed for $3,900.00 damages because she was forced to seek part-time employment. She also sought attorneys fees and costs.

In Count II, adding the Attorney General and the sole surviving heirs of Mr. Wilson as parties, she prayed that the "defendant's" [UMKC?] policy, custom, usage and practice" of denying her the right to apply for and recover benefits under the will solely on account of her sex is a denial of equal protection. She prayed the court to apply the doctrine of cy pres and requested the court to construe the will by substituting the word "students" or "individuals" for the word "boys".

The trustee, Bank, the Board of Curators and the Attorney General moved to dismiss. They also filed answers. They alleged that (1) the will creates a charitable trust to provide funds to assist "boys", (2) there is no state action and that plaintiff failed to state sufficient facts, (3) § 1983 does not provide a civil claim for damages, (4) that a § 1983 action is not cognizable in a state court, (5) any action of the Board has not been motivated by any intention to discriminate on the basis of sex but due to a duty to the donor, (6) plaintiff failed to allege an actual controversy and (7) that state and public officials are immune from damages under § 1983.

On August 6, 1975, the trial court entered its judgment dismissing the plaintiff's second amended petition with prejudice "for the reasons asserted in the motions of the

4. Art. I, § 2, Mo.Const., Ninth and Fourteenth Amendments, U.S.Const.

various defendants, and for the reasons stated by the court when it dismissed the first amended petition of each plaintiff."

IV.

[2] On appeal, Ms. Shapiro makes several points. She contends that the trial court erred in dismissing her second amended petition for failure to state a claim because (1) "the evidence under the petition would demonstrate 'state action' and therefore a violation of appellant's constitutional rights" in that (a) the scholarship is "administered" by an office of the University, (b) the "evidence" would show that the trustee "rubber stamps"[5] the recipients of funds who are actually "selected" by the University, and (c) it is "believed" that the evidence would show that the scholarship makes up three-fourths of the scholarship money at the university and as such has "virtually" created a sexually discriminatory scholarship program,[6] (2) the petition contains a short and plain statement of facts, (3) the Civil Rights Act, 42 U.S.C.A. § 1983(a) supports a claim for damages based on sex discrimination, (b) authorizes such a claim to be cognizable in a state court, (c) the state Board of Curators or the state officers are not immune from such a claim, and (4) the claim is not moot.

5. This term is also stated in appellant's statement of facts with no reference to a transcript page. There is no such term in the transcript.

6. The motion to dismiss tests the sufficiency of the petition, not evidence, to state a claim for relief. Only those matters appearing on the face of the petition and matters which may be raised by motion are considered. *Cf. Hamilton* v. *Linn*, 355 Mo. 1178, 200 S.W.2d 69 (Mo. 1947). Since the motion brought out matters outside the pleadings, the trial court may have treated the motion to dismiss as one for summary judgment. Rule 55.27(a). There is no indication, however, that it did so, therefore we rule on whether the petition states a claim.

[3] On the other hand the several defendants on appeal raise several points. Together they raise the contentions that (1) the petition does not state a claim for relief because there was no violation of the appellant's constitutional rights since there was no state action involved, (2) the claim was moot since plaintiff had graduated from law school[7], (3) that the state court lacked jurisdiction over the subject matter because the state court may not entertain a § 1983 action, (4) that no damages may be maintained under § 1983 and that (5) the Board of Curators is immune.[8]

V.

[4] Before we examine the critical issue central to the disposition of this case, we must determine whether

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7. Both the Bank and Board of Curators contend the claim is moot because Ms. Shapiro has graduated from law school. Ms. Shapiro contends it is not because she may desire to go to graduate school. While we believe the claim may well be moot under Missouri cases, mootness does not preclude a decision where the question is one of great public importance and involves the public rights or interests under conditions which may readily recur. *Triplett* v. *Grundy Electric Cooperative, Inc.*, 389 S.W.2d 401, 408 (Mo.App.1965); *Lawyers' Association of St. Louis* v. *City of St. Louis*, 294 S.W.2d 676, 680 (Mo.App.1956); *Western Auto Supply Company* v. *Banner*, 288 S.W.2d 402, 403 (Mo.App.1956). *See also State ex rel. Reser* v. *Rush*, 562 S.W.2d 365 (Mo.1978).

8. Because of the disposition we make of this cause it is unnecessary to determine whether damages may be maintained in a § 1983 action nor is it necessary to determine whether and under what circumstances the Board or the individual members are immune. For the issue of damages see: *Carey* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (19); *Monell* v. *Dept. of Soc. Serv. of City of N.Y.*, ... U.S. ....., 98 S.Ct. 2018, 56 L.E.2d 611 (1978); *Thonen* v. *Jenkins*, 517 F.2d 3, 5 (4th Cir. 1975); for the issue of immunity see: *Gay Lib* v. *The University of Missouri*, 416 F.Supp. 1350, 1365 (W.D.Mo.1976), rev'd. on other grounds, 558 F.2d 848 (8th Cir. 1977); *Cf. Monell* v. *Dept. of Soc. Serv. of City of N.Y.*, *supra*, overruling *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), insofar as it holds that local governments are immune under § 1983. *See also* cases collected in *Gay Lib*, 416 F.Supp. at 1364 including *Prostrollo* v. *University of South Dakota*, 507 F.2d 775 (8th Cir. 1974) and *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975).

this action brought under § 1983 is cognizable in the state court. The Attorney General contends that no jurisdiction lies. He relies on *Chamberlain* v. *Brown*, 223 Tenn. 25, 442 S.W.2d 248 (Tenn.1969) and *Beauregard* v. *Wingard*, 230 F.Supp. 167, 185 (S.D.Cal.1964). It is argued that § 1983 creates a uniquely federal remedy which a state court is powerless to adjudicate.

The Supreme Court of the United States has not clearly articulated[9] whether the state courts have concurrent jurisdiction to entertain § 1983 claims. The state courts which have considered the matter (save one—*Chamberlain* v. *Brown*) are of the opinion that the 1871 Civil Rights Act does not exclude jurisdiction in the state courts. This opinion rests on both 28 U.S.C.A. § 1343 which vests original but not exclusive jurisdiction in the federal system and the legislative history of the Civil Rights Act and its successor statutes. The courts which have considered the matter have concluded that § 1983 does not reserve exclusive jurisdiction in the federal courts, but that a § 1983 action is cognizable in the state courts.[10]

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9. Three decisions by cogent implication hold that the § 1983 remedy is available in the state court: *Jones* v. *Hildebrant*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977); *Adlinger* v. *Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), dissent of Brennan, J., n. 17, 427 U.S. at 36, 96 S.Ct. at 2430, 49 L.Ed.2d at 298; and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238, 90 S.Ct. 400, 405, 24 L.Ed.2d 386 (1969).

10. See *Alberty* v. *Daniel*, 25 Ill.App.3d 291, 323 N.E.2d 110, 113-114 (1974)—choosing not to follow *Chamberlain; Dudley* v. *Bell*, 50 Mich.App. 678, 213 N.W.2d 805, 806-807 (1976); *Gomez* v. *Board of Ed. of Dulce Ind. Sch. Dist. No. 21*, 85 N.Mex. 708, 516 P.2d 679, 681 (1973)—recognizing principle; *McClanahan* v. *Cochise College*, 25 Ariz.App. 13, 540 P.2d 744, 751 (1975); *Silverman* v. *University of Colorado*, 36 Colo.App. 269, 541 P.2d 93, 98 (1975); *Commonwealth ex rel. Saunders* v. *Creamer*, 464 Pa. 2, 345 A.2d 702 (1975); *Clark* v. *Bond Stores, Inc.*, 41 A.D.2d 620, 340 N.Y.S.2d 847 (1973).

Federal decisions contrary to *Beauregard* v. *Wingard* are: *Long* v. *District of Columbia*, 152 U.S.App.D.C. 187, 469 F.2d 927,

(*Continued on following page*)

In *Alberty* v. *Daniel*, 25 Ill.App.3d 291, 323 N.E.2d 110, 113-114 (1974), the Illinois court held that an action is cognizable in the state system concurrently with the federal court.

The contention of the Attorney General that a state court has no power to adjudicate a § 1983 claim rests on *Chamberlain* and *Beauregard*. These cases stand alone and contrary to all the decisions of the respective courts of each respective jurisdiction which are unanimous that 28 U.S.C.A. § 1343 allows a state court to adjudicate such claims concurrently with the federal court.

The Attorney General also cites *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). That case does not concern the problem of state court jurisdiction but only the right of the petitioner to enjoin under § 1983 a state court proceeding which threatens his constitutional rights.

Based on § 1343, 28 U.S.C.A. and the authority of most courts which have considered the question and based on the fact that the circuit courts of this state are courts of general jurisdiction and such courts are vested with concurrent jurisdiction of actions under § 1983, the trial court therefore is required to adjudicate the cause brought by Ms. Shapiro.

VI.

[5] Turning to the merits relative to "state action", the precise issue, as we perceive it, is whether the equal

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Footnote continued—

937 (1972); *Luker* v. *Nelson*, 341 F.Supp. 111, 116 (N.D.Ill.1972); *Davis* v. *Towe*, 379 F.Supp. 536, 538 (E.D.Va.1974) aff'd. without opinion, 526 F.2d 588 (4th Cir. 1954); *International Prisoners' Union* v. *Rizzo*, 356 F.Supp. 806, 810 (E.D.Pa.1973); *Bennum* v. *Board of Governors of Rutgers, Etc.*, 413 F.Supp. 1274, 1279 (D. N.J.1976).

protection clause of the Fourteenth Amendment and the Civil Rights Act § 1983 are violated when a private individual establishes a charitable trust for scholarships for the benefit of "deserving boys" to attend a private university which later becomes public and the funds are disbursed under the will by a private trustee but the state university processes, and from a particular class of boys makes a "tentative award"[11] to members of that class and forwards the names to the private trustee which are then "approved" by the trustee. Does such "process and procedure" excluding women applicants violate constitutional principles? The resolution of this issue is not an "easy task" because the courts are committed to both educational opportunity for all and to the encouragement of private charitable trusts. There is no doubt under the facts that the University is "involved" in the administration of the trust but so is the private trustee. The question is is the "involvement" of the University so pervasive or extensive that the involvement constitutes state action.

The "process and procedure" for disbursing scholarship funds under the Victor Wilson Trust, as we garner it from the petition, answers to interrogatories, and the motions to dismiss, are as follows: (1) information concerning the Victor Wilson Scholarship is widely disseminated and appears in the under-graduate catalog, (2) general university applications are completed by an applicant and filed with the student financial aid office, (3) a financial statement is also completed, (4) the financial statement is processed by a nationally recognized agency, (5) the student financial aid office receives reports of academic standing of the applicant

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11. A letter from the associate Director of the financial aid office stated that the staff makes "tentative awards" (not selects) and the recommendations are forwarded to the trustee and the students are then notified of the scholarships. The Bank contends that the University merely performs ministerial duties.

which must be roughly in the top quartile of entering and continuing male students, (6) when all files are completed they are forwarded to a professional staff within the University which reviews the eligible candidates, (7) the professional staff forwards the names of those persons within the class established by the trust and makes a "tentative award" subject to the approval of the private trustee and the recommendation letters are forwarded to the trustee bank for "approval" and (8) after such approval by the private trustee the University informs the male students of their awards.[12] The University does not, however, recommend any female students.

The appellant's petition alleges that the University has developed a "process and procedure" through which women are systematically screened out and excluded solely on the basis of sex.

Appellant, Ms. Shapiro, concedes that a private individual may dispose or use his or her money or property to benefit any particular person or group even though there is discrimination on the basis of sex, but argues that the "process and procedures" here involve an agency of the state in such a degree to assist in the achievement of discrimination by "screening out" women from the fund and that such process and procedures are violative of the constitutional provisions of federal law.[13] We must determine whether

12. This appears to be the actual procedure used.

13. She relies on various authorities including *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); *Evans* v. *Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Burlington* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) and *Commonwealth of Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957). The Philadelphia case has a long history: See *In re Girard Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), *cert. den.* 357 U.S. 570, 78 S.Ct. 1383, 2 L.Ed.2d 1546 (1958); *Commonwealth of Pennsylvania* v.

(*Continued on following page*)

under the Fourteenth Amendment as applied to the states and state constitutional provisions there is significant state action so as to violate appellant's constitutional rights.

VII.

The concept of "state action"[14] has had a long and involved history. Neither the Supreme Court of the United States, nor any other court, has attempted the "impossible task" of formulating an infallible test to determine whether the state "in any of its manifestations has become significantly involved in private discriminations." *Reitman* v. *Mulkey*, 87 S.Ct. at 1632.

The general principles are well known. But, as Mr. Justice Douglas indicates "generalizations do not decide concrete cases." *Evans*, 86 S.Ct. at 488.

[6] The dichotomy set forth in the Fourteenth Amendment between deprivation by the State, subject to scrutiny under its provisions and private conduct "however discriminatory and wrongful" against which the Fourteenth Amendment offers no shield goes back as far as the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed.2d 835 (1883).[15] There was "embedded in our constitutional law" the principle that "the action inhibited by the [Equal Protection

Footnote continued—

Brown, 270 F.Supp. 782 (E.D.Pa.1967); *Commonwealth of Pennsylvania* v. *Brown*, 392 F.2d 120 (3rd Cir. 1968), *cert. den.* 391 U.S. 921, 88 S.Ct. 1811, 20 L.Ed.2d 657 (1968); Clark, Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979 (1957); IV Scott, Trusts, § 370.5, pp. 2876-2878 (1967).

14. See Lewis, The Meaning of State Action, 60 Colum.L. Rev. 1083 (1960); Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065 (1969); Goldstein, Death and Transfiguration of the State Action Doctrine—*Moose Lodge* v. *Irvis* to *Runyon* v. *McCrary*, 4 Hastings Const.L.Q. 1 (1977).

15. See *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).

Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 843, 92 L.Ed 1161 (1948). Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to "some significant" extent "the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority,* 81 S.Ct. at 860. It is clear therefore that private discriminatory action is not violative of any constitutional principle and is indeed beneficial to a freedom loving society. It is only when the state "so far" insinuates itself into a "position of interdependence" that it becomes a "joint participant" in the challenged activity or where private conduct becomes "so entwined" with governmental policies that there is a violation. *Evans* v. *Newton,* 86 S.Ct. at 488;[16] *Burton* v. *Wilmington Parking Authority,* 81 S.Ct. at 862. "The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be fairly treated as that of the state itself." *Jackson,* 95 S.Ct. at 453.

[7] While there are many tests as to what constitutes state action,[17] probably the ultimate is "[o]nly by sifting

16. The holdings of the Supreme Court indicate that where the "impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibitions." *Moose Lodge* v. *Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

17. See Developments in the Law, *supra,* 82 Harv.L.Rev. at 1069-1073 and Note, Sex Restricted Scholarships and the Charitable Trust, 59 Iowa L.Rev. 1000, 1002-1005 (1976). See also discussion by Higgins, C., in *First National Bank of Kansas City* v. *Danforth,* 523 S.W.2d 808, 819 (Mo.1975), *cert. den. sub nom. Sutt* v. *First National Bank of Kansas City,* 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975) and *Lakeside Hospital Association* v. *First National Bank of Kansas City,* 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975).

facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton,* 81 S.Ct. at 860.[18]

In *Burton* v. *Wilmington Parking Authority, supra,* the Supreme Court of the United States held that there was "state action", violative of the Equal Protection clause, when a coffee shop, located in a building owned and operated by a state agency refused to serve blacks. The land and building were publicly owned, and the building was dedicated to public uses in the performance of the State agency's essential governmental functions. Upkeep and maintenance were responsibilities of the state agency. All of these and other activities, obligations and responsibilities of the Wilmington Parking Authority (a state agency), together with the fact that the coffee shop was operated as an integral part of a public building indicated that degree of state participation and involvement in discriminatory action contrary to the design of the Fourteenth Amendment. Although the state neither commanded or expressly authorized or encouraged discrimination, the state by its inaction made itself a party to the refusal of services which could not be considered the purely private choice of the restaurant operator.

18. Numerous other tests also exist: (1) When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State subject to its constitutional limitations; or where there is government "control". *Evans* v. *Newton,* 86 S.Ct. at 488; (2) Another test in the context of the opinion is "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron,* 358 U.S. 1, 4, 78 S.Ct. 1401, 1403, 3 L.Ed.2d 5 (1958) quoted in *Burton,* 81 S.Ct. at 860; (3) State action for purposes of Equal Protection may emanate from rulings of administrative agencies. *Irvis,* 92 S.Ct. at 1974; (4) the "public function" analysis, *Terry* v. *Adams,* 345 U.S. 461, 469, 73 S.Ct. 809, 813, 97 L.Ed. 1152 (1953); *Marsh* v. *Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). See also dissent by Mr. Justice Stevens in *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

In *Reitman* v. *Mulkey, supra,* a provision of the California Constitution prohibiting the state from denying the right of any person to decline to sell, lease or rent his real property to any person in his absolute discretion involved significiant state action and was found violative of the constitutional prohibitions.

In *Evans* v. *Newton, supra,* one of few cases coming to the Supreme Court involving a trust, the Supreme Court held that state action was "entwined" with private action. There, former Senator Bacon of Georgia executed a will which devised to the City Council, as trustee, a tract of land which was to be used for a park for white people only. The will provided that the park should be under the control of a Board of Managers all of whom are white. After the city took the position that the park was a public facility, the Board of Managers sought to remove the City as trustee and appoint new trustees. The Supreme Court held that the tradition of the use of the park for public activities where the tradition of municipal control had become firmly established, the substitution of private trustees did not transfer the park from the public to the private sector.[19]

In *Commonwealth of Pennsylvania* v. *Board of Directors, supra,* the high court held that where the will of Stephan Girard left a fund in trust to the City of Philadelphia for the erection and maintenance of a college for "poor white male orphans" state action was involved.

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit [black applicants] to the college . . . was discrimination by the State." 77 S.Ct. at 807.

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19. See *Evans* v. *Abney,* 396 U.S. 435, 90 S.Ct. 628, 24 L.E.2d 634 (1970) where the Court held the Bacon trust failed and that cy pres was not to be applied.

Not every activity of this State, however, constitutes state action prohibited by constitutional provisions. In *Moose Lodge* v. *Irvis,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), Irvis was refused service by Moose Lodge because of his race. He contended that because the state liquor board had issued the Lodge a private club license that authorized the sale of alcoholic beverages, the refusal of services to him was state action for purposes of the Equal Protection Clause. The Court held that the operation of the State's regulatory scheme enforced by the state liquor board did not sufficiently implicate the state in the discriminatory guest policies of the club so as to constitute state action:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . ." 92 S.Ct. at 1971.

And in *Jackson* v. *Metropolitan Edison Company, supra* no state action was found where a state regulated utility terminated electric service without affording notice and a hearing.

Finally, in *First National Bank* v. *Danforth, supra,* we held that there was no invidious discrimination or state action where Mr. Homer McWilliams established the "McWilliams Memorial Hospital Trust" and directed that the net income from the trust be used annually for the maintenance, support and care of sick and infirm patients "born of white parents in the United States of America." Mr. McWilliams was a private individual; the corpus of the trust was derived solely from his private funds; the trustee was a privately owned bank. No public body was involved; no en-

twinement by the state was found, hence there was no state action.[20]

[8] It is clear that the Fourteenth Amendment does not apply to purely private trusts. *In Re Will of Potter*, 275 A.2d 574, 580 (Del.Ch.1970). As stated by Mr. Justice Douglas in *Evans* v. *Newton, supra*:

> "If the testator wanted to leave a school or center for the use of one [group] only and in no way implicated the state in the supervision, control or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered." *Evans*, 86 S.Ct. at 489.

VIII.

In the area of the establishment of scholarship funds to attend a college or university, the law is now developing. There are many legitimate varieties and purposes for such scholarship funds. Funds come from a great variety of sources and trusts designate many types of eligible recipients. Sororities establish scholarships for "any woman with a master degree"; scholarships have been established to aid "young women of the Greater New Bedford Area"; scholarships aid persons of "Scottish descent" and "Black veterans". See Note, Sex Restricted Scholarships and the Charitable Trust, 59 Iowa L.Rev. at 1001.

While scholarships or trust funds have been available to only persons of one sex or race, these restrictions have not, in the past, been the precise issue in controversy.[21]

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20. Both parties rely on *Danforth*. That case is factually distinguishable because there was no state activity. That case is not controlling as to the facts here.

21. See Note, *supra*, 59 Iowa L.Rev. 1000; Note, Restricted Scholarships State Universities and The Fourteenth Amendment, 56 Va.L.Rev. 454 (1970).

It is only in recent years that the sensitivity to sex discrimination has brought challenges. No case has been decided in this state. In this area, each case must hinge on its own facts. The involvement of the State may take many forms. It ranges from state institutions being named and acting as the trustee to the mere admission of a student. Between these poles lies a difficult area.

IX.

From the principles discussed in all the authorities summarized above, and from the facts as developed in this particular case, we cannot conclude that by sifting all the facts and circumstances there was "state action" involved here. Mr. Victor Wilson established a private trust for the benefit of deserving Kansas City "boys". He was a private individual; he established the trust with his private funds; he appointed a bank as private trustee; he established in his will a procedure by which the recipients of the trust funds would be selected. The trustee was to approve the selections. Under the terms of the will no public agency or state action is involved. Discrimination on the basis of sex results from Mr. Wilson's personal predilection. That is clearly not unlawful. And taking the allegations of the appellant's petition, and allegations raised on the motions to dismiss and the record of this proceeding, we do not believe that the participation by the agents of the University of Missouri at Kansas City is of such a significant extent in any of its manifestations or is so entwined with private conduct that state action results.

The dissemination of information by the University in a catalog and by other means, the accepting and processing of applications by the financial aid office, the determining of academic standards and financial needs, the making of a "tentative award" or the "nomination" and forwarding the

names of qualified male students to the private trustee which "approve" the names of the male students and which finally award the scholarship does not in our opinion rise to the level of state action.

The involvement of the University is not such which calls into play the Fourteenth Amendment. The agents of the University, under the will, do not have the *power* to "select", or "determine", or "ultimately and finally determine" those qualified "boys" who finally are awarded scholarship funds. The trustee has that power. The trustee has the power to "approve" male applicants. The power to "approve" includes the power to "disapprove". The final and last act of "selection" is left to and is that of the private trustee.

This case is not equivalent to a situation where the *trustee* is a state body, or where the "selection committee" is composed of public officials who are required under the trust to "select" the recipients of the funds as in *Girard*, *Stabler*, *Buchanan*, *Wachovia*, and *Potter*.[22] The final de-

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22. *Milford Trust Company* v. *Stabler*, 301 A.2d 534 (Del. Ch.1973). There over a period of years the selection committee consisted of persons who had held or held positions in the state educational administration. The will of the testator did not provide as to how selection was to be made, and the selections were actually and finally made by state officers.

In Bank of Delaware v. *Buckson*, 255 A.2d 710 (Del.Ch.1969) the committee named in the will to "decide" scholarships were state officers and the will was construed to include blacks because of the language of the instrument.

In Wachovia Bank and Trust Company, N.A. v. *Buchanan*, 346 F.Supp. 665, (D.C.Cir.1972), aff'd. without opinion, 159 U.S. App.D.C. 343, 487 F.2d 1214 (1973) the recipients were to be awarded scholarships by a committee composed of persons holding elective or appointed public positions. The court held that under such circumstances the administration of the trust was on a discriminating basis.

In *In Re Will of Potter, supra*, the Delaware Court held that the Chancery Court was so involved in the trust that state action

(*Continued on following page*)

cision whether an individual is awarded a scholarship is that of the private trustee. The "process and procedure" of the University has not so far "insinuated itself" in the administration of the trust so that the action is that of the state nor can the challenged action be treated as ultimately that of the state.

The university has no discretion under the terms of the trust to forward the names of women to the private trustee; the discretion exists only as to those members within the class who are recommended for final selection by the trustee. The university cannot request the trustee to violate the terms of the trust thus subjecting it to possible sanctions.

Viewing the allegations of the petition as drawn, it does not state a claim.

We, of course, approve equal access to educational opportunity. Such opportunity is important to our society. But this must be balanced by the right of a private person to dispose of his money or property as the testator wishes, and unless the trust is unlawful, private trusts are to be encouraged.

Hence, since we hold that there is no constitutional violation of equal protection or federal law, the trial court did not err in dismissing the second amended petition with prejudice.

Footnote continued—

existed. The court stated that the "involvement of the Court of Chancery in the supervision and direction of the administration of the charitable trust [of Colonel Potter] is of such an established and pervading nature that such involvement constitutes that type of governmental entwinement with the affairs of a charitable trust which calls into play the Fourteenth Amendment." 275 A.2d 583. *Cf.* Annot., 25 A.L.R.3d 736, 741-746 (1969) and 1977 Supp. at 19-21, and *Cohen* v. *Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975).

X.

[9] Plaintiff also alleges a right under 42 U.S.C.A. § 1983. The "under color of law" provision is equivalent to the state action requirement under the Fourteenth Amendment.[23] Because we conclude that there is no significant state action, plaintiff's claim under § 1983 also fails. Section 1983 was intended to encompass only conduct supported by state action. *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 90 S.Ct. 1598, 1611-1614, 26 L.Ed.2d 142 (1970); *Lucas* v. *Wisconsin Electric Power Company*, 466 F.2d 638, 654-656 (7th Cir. 1972), *cert. den.* 409 U.S. 1114, 93 S.Ct. 928, 34 L.Ed.2d 696 (1973).[24]

Although appellant raises other points, they are not necessary for a resolution of this proceeding since we have resolved the central issue. The judgment of the trial court in dismissing the second amended petition should be affirmed.

Judgment affirmed.

MORGAN, C. J., and BARDGETT, FINCH, and RENDLEN, JJ., concur.

---

23. *Flagg Bros., Inc.* v. *Brooks*, 553 F.2d 764, 766 (2nd Cir. 1977); *cert. granted* 434 U.S. 817, 98 S.Ct. 54, 54 L.Ed.2d 72 (1977), rev'd. on other grounds, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Parks* v. *"Mr. Ford"*, 556 F.2d 132, 135, note 5 (3rd Cir. 1977); *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739, 741 (2nd Cir. 1974), *cert. den.* 419 U.S. 1009, 95 S.Ct. 329, 42 L.Ed.2d 284 (1974); *Adams* v. *Southern California First National Bank*, 492 F.2d 324, 329 (9th Cir. 1973); *Martin Hodas, East Coast Cinematics* v. *Lindsay*, 431 F.Supp. 637 (D.C.N.Y. 1977); *Weiss* v. *J. C. Penney Co., Inc.*, 414 F.Supp. 52 (D.C.Ill. 1976).

24. The parties do not raise and we do not consider what effect, if any, the 1972 Amendments to Title IX of the Higher Education Act have on this cause. *See* 20 U.S.C., § 1681 et seq.; 15 Am.Jur.2d, Civil Rights, § 84, pp. 468-470 (1976); Title IX § 901, Education Amendments of 1972, 1 U.S.Code Congressional and Admin.News, pp. 444-445.

DONNELLY, J., concurs in part and dissents in part in separate opinion filed.

SEILER, J., concurs in part and dissents in part and concurs with separate opinion of DONNELLY, J.

JOSEPH J. SIMEONE, Special Judge, concurs in part and dissents in part in separate opinion filed.

DONNELLY, Judge, concurring in part and dissenting in part.

I concur in Part V of the majority opinion. It recognizes that an action brought under 42 U.S.C.A., § 1983 is cognizable in Missouri state courts. I dissent to the remainder of the opinion.

As recognized in the majority opinion, a resolution of the issues in this case is "not an 'easy task' because the courts are committed to both educational opportunity for all and to the encouragement of private charitable trusts." However, despite the difficulty of the issues and the importance of facts for a proper resolution of the issues, the majority proceeds to find the facts and to determine the issues without affording plaintiffs an opportunity to present the facts in evidence at a trial.

In *Boyer* v. *Guidicy Marble, Terrazzo & Tile Co.*, 246 S.W.2d 742, 744 (Mo.1952), this Court said:

> "It is important to be mindful of the fact that we here consider only the question of whether plaintiff's amended petition, when its averments are accorded every reasonable and fair intendment, states a claim which can call for the invocation of the principles of substantive law which may entitle plaintiff to relief. . . ."

In *Scheuer* v. *Rhodes*, 416 U.S. 232, 249, 250, 94 S.Ct. 1683, 1693, 40 L.Ed.2d 90 (1974), the plaintiffs had filed a complaint seeking damages against the President of Kent State University and other government officials. The defendants claimed immunity. The District Court dismissed the complaint on the basis of the allegations of the complaint and affidavits filed by defendants. The United States Supreme Court reversed and said:

> "These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here. . . .
>
> * * *
>
> "The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.
>
> "We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it

> will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved."

In my opinion, plaintiff is entitled to have "judicially resolved" the issues (1) whether state action is involved in this case, and (2) whether the doctrine of deviation or the cy pres doctrine should be applied here. I would reverse the judgment of the trial court and remand the case for trial.

JOSEPH J. SIMEONE, Special Judge, concurring and dissenting.

I concur in part and dissent in part.

As to the principal issue—state action— I respectffully dissent. The thrust of the majority opinion is that the University of Missouri at Kansas City is not so entwined with the administration of the Victor Wilson Trust so as to constitute state action within the meaning of the Constitution or federal law. I disagree.

The majority opinion correctly traces the law and history of state action. But I believe that the involvement of the University now a public institution is of such a prevailing nature so as to constitute that type of governmental entwinement with the administration of the trust which calls into play the doctrine of state action.

While Mr. Wilson established a private trust for the benefit of deserving boys with private funds and appointed a private trustee, the actual administration of the trust by the University of Missouri as it has been operated over the years involves, in my opinion, the University and its agents to such an extent that I believe state action is involved. For all practical purposes the University

through its agents "selects" the males who are to receive the scholarship funds thus engaging in state action. Although the private trustee has the power of "approval" under the trust there is no indication in all recent years of its operation that the University has disapproved any male applicant. The University accepts the applications, makes a tentative award and in effect "selects" the male applicants who are to receive the benefit of the scholarship fund. The acts of the University are more than ministerial. The trust as it has been administered by the University has shed its purely private character and has become a public one. The involvement of the public University is, in my opinion, of such a prevailing nature so that there is governmental entwinement constituting state action.

Under the facts and the authorities I would conclude that the administration of the Victor Wilson Trust by a public institution involves state action which, if proved upon hearing, would be violative of constitutional and statutory principles. I believe therefore that the petition states a claim.

Appellant also alleges a right under 42 U.S.C. § 1983. The "under color of law" provision is equivalent to the state action requirement under the Fourteenth Amendment. *Parks* v. *"Mr. Ford"*, 556 F.2d 132, 135, note 5 (3rd Cir. 1977). Because I believe that the petition alleges significant "entwinement" by the University and find "state action", I believe plaintiff also states a claim under § 1983. That section is intended to encompass conduct supported by state action. *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 90 S.Ct. 1598, 1611-1614, 26 L.Ed2d 142 (1970).

II.

I agree with the majority opinion in its holding that the state court is vested with concurrent original jurisdiction of actions brought under § 1983.

III.

Although I believe state action is involved under the facts here and would reverse and remand the cause for further proceedings, I would not, as appellant prays, apply the doctrine of cy pres to construe the Trust by substituting the word "students" or "individuals" for the word "boys" in Article VIII.

The doctrine of cy pres alters the purpose of the trust, whereas the doctrine of deviation only amends the method of administration of the trust. See *Reed* v. *Eagleton*, 384 S.W.2d 578, 585 (Mo. 1964).

I would apply the principle of deviation. The remedy prayed for in my opinion is too drastic—to displace one trust purpose for another. Any constitutional infirmity is in the administration of the trust and not in its purpose. The trust can be insulated from governmental action by the removal of the University of Missouri from the selection process of the beneficiaries.

IV.

I believe that the petition states a claim and would reverse and remand. I therefore respectfully dissent in part.

(SEAL)

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri 65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

February 13, 1979

Mr. Steven J. Borel
23 Westport Square
435 Westport Road
Kansas City, MO 64111

In re: Marilyn Shapiro vs. Columbia Union National Bank & Trust Company, et al. - No. 60561

Dear Mr. Borel:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled; opinion modified on court's own motion by deleting "alumni of" on line 7 of page 5."

Yours very truly,

/s/ Thomas F. Simon
Clerk.

cc: Ann Mesle Whittier
Maurice J. O'Sullivan, Jr.
Attorney General
Guy A. Magruder, Jr.
Jackson A. Wright

IN THE
CIRCUIT COURT OF MISSOURI, SIXTEENTH
JUDICIAL CIRCUIT

No. 769889

MARILYN SHAPIRO, et al.,
Plaintiffs,
v.
COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, et al.,
Defendants.

SECOND AMENDED PETITION OF MARILYN SHAPIRO

(Filed September 25, 1974)

COUNT I

Comes now plaintiff Marilyn Shapiro and, with leave of Court first obtained, for her cause of action in Count I against the defendants, states:

* * *

3. Defendant Charles B. Ratchford is a resident of the State of Missouri and President of the University of Missouri.

4. Defendant James C. Olson is a resident of the State of Missouri and Chancellor of the University of Missouri - Kansas City.

5. Defendant Curators of the University of Missouri is a public corporation and the governing body of the University of Missouri - Kansas City pursuant to Chapter 172, Missouri Revised Statutes 1969 and Article IX, Section 9 of the Missouri Constitution.

* * *

7. On or about July 16, 1964, this Court by judgment and decree entered in a cause then pending in this Court entitled, "Union National Bank in Kansas City, Trustee under the Last Will and Testament of Victor Wilson, Deceased, Plaintiff, vs. The Curators of the University of Missouri, et al., Defendants," and bearing Docket Number 654,989, construed the words, "University of Kansas City" whenever used in the decedent's Last Will and Testament "during the term of the trust therein created . . . to mean 'University of Missouri at Kansas City,'" with respect to the use of income of the trust during the term of same. * * *

* * *

9. Defendants Olson, Ratchford and Curators and their agents have developed and continue to maintain, with the support and acquiescence of the Defendant Trustee Bank, a process and procedure through which women, including Plaintiff, are systematically screened out and excluded from consideration and approval by Defendant Trustee Bank for financial aid from the Victor Wilson Scholarship solely on the basis of sex.

* * *

12. Denial to Plaintiff of the opportunity to apply for, be considered for, and be approved for financial aid from the Victor Wilson Scholarship by Defendants Ratchford, Olson and Curators, by and through their officers, agents, and employees all being employees and agents of the State of Missouri, and the denial of same by the Defendant Trustee Bank, is done under color of and by virtue of state law and constitutes action of the State of Missouri within the terms of the Fourteenth Amendment of the United States Constitution and other applicable law.

13. The refusal to permit Plaintiff to apply for, be considered for, and approved for financial aid from the

Victor Wilson Trust as above stated, for the reason that Plaintiff is a woman, is a denial to Plaintiff of her rights as guaranteed by Article I, Section 2, of the Missouri Constitution, by the Ninth and Fourteenth Amendments of the United States Constitution and by Title 42 U.S.C. Section 1983, in that Plaintiff has been denied equal protection under law and due process under law and the privileges and immunities which are guaranteed to all citizens of the United States and other rights and privileges under law as embodied in the Constitution and laws of the United States and the State of Missouri.

14. As a result of such unlawful discrimination Plaintiff has been denied needed financial aid which is not otherwise available at the University of Missouri - Kansas City; has been damaged in the amount of $3,900.00; and has been forced to seek part-time employment, thereby taking away from her studies, and otherwise has caused her and will continue to cause her irreparable harm.

WHEREFORE, Plaintiff respectfully prays for judgment in the amount of THREE THOUSAND NINE HUNDRED DOLLARS ($3,900.00), reasonable attorneys' fees, and the costs of this action, and for such additional or alternate relief as may appear to the Court to be just and proper.

COUNT II

Comes now Plaintiff Marilyn Shapiro and, with leave of Court first obtained, for her cause of action in Count II against Defendants, states:

1. Plaintiff incorporates by reference all of Count I as if fully set out herein.

* * *

WHEREFORE, Plaintiff respectfully prays:

1. That this Court adjudge, decree and declare that Defendant's policy, custom, usage and practice of denying Plaintiff Marilyn Shapiro the right to apply for and receive benefits, if qualified, according to the other provisions under the Wilson Will, from the Victor Wilson Trust Fund solely on account of her sex is a denial of equal protection of the laws and is an unconstitutional deprivation of Plaintiff's rights as guaranteed by Article I, Section 2 of the Missouri Constitution, the Ninth and Fourteenth Amendments to the Constitution of the United States, and by other statutes and laws of the United States and of the State of Missouri, and that this Court apply the doctrine of Cy Pres and rule that the Victor Wilson Trust should henceforth be construed by substituting the word "students" or "individuals" for the word "boys" in Article VIII of said will.

* * *

Stupps, Epstein & Mann

/s/ Steven J. Borel
Steven J. Borel 842-5484
510 Bryant Building
1102 Grand Avenue
Kansas Ctiy, Missouri

/s/ Ann Whittier
Ann Whittier
500 Merchants-Produce Bank Bldg.
531 Walnut
Kansas City, Missouri

Attorneys for Plaintiff, Marilyn Shapiro

ALVIN C. RANDALL
Judge of the Circuit Court
Division No. 4
Kansas City, Mo.

August 6, 1975

Re: Marilyn Shapiro, et al
vs.
Columbia Union National Bank and Trust Co., et al

No. 769889

Ladies and Gentlemen:

The Court has on this date entered the following order:

"Plaintiff Shapiro's second amended petition, and her cause of action are hereby dismissed with prejudice, at the cost of plaintiff Shapiro and plaintiff Yale University, for the reasons asserted in the motions of the various defendants, and for the reasons stated by the court when it dismissed the first amended petition of each plaintiff. Attorney fees are allowed to Columbia Union National Bank in the sum of $3,000.00. Attorney fees are allowed to the University of Missouri in the sum of $3,000.00, all fees to be paid by the trust. Requests by plaintiff Shapiro and Plaintiff Yale University for attorney fees are each denied."

Sincerely,

/s/ S Curls
Sandra Curls, Clerk

ALVIN C. RANDALL
Judge of the Circuit Court
Division No. 4
Kansas City, Mo.

August 16, 1974

From: Judge Alvin C. Randall

To: Attorneys for the Parties

Re: Marilyn Shapiro and Yale University
vs.
Columbia Union Bank, et al

Circuit Court No. 769889

Dear Persons:

I have this date entered the following order:

"Pursuant to the motions of the various defendants, plaintiff Marilyn Shapiro's first amended petition is dismissed for failure to state a claim upon which relief may be granted. The first amended petition of plaintiff Yale University is dismissed, for the reason that it fail to state a claim upon which relief may be granted, and for the further reason that Yale University is not a real party in interest herein. The cost herein is assessed against the two plaintiffs, jointly and severally."

* * *

Very truly yours,

/s/ Alvin C. Randall

Supreme Court, U. S.
FILED
JUN 7 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT THE CURATORS OF THE UNIVERSITY OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

GUY A. MAGRUDER, JR.
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JACKSON A. WRIGHT
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,
vs.
COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT THE CURATORS OF THE UNIVERSITY OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Respondent The Curators of the University of Missouri, a public corporation of the State of Missouri, prays that the Court deny the petition for writ of certiorari filed by Marilyn Shapiro, petitioner, to review the decision of the Supreme Court of Missouri in the case of *Shapiro* v. *Columbia Union National Bank and Trust Company*, 576 S.W.2d 310 (Mo. en banc, 1978).

QUESTIONS PRESENTED

1. Is petitioner's case moot?
2. Does petitioner have standing to proceed in this Court?

3. Does petitioner's Second Amended Petition state a claim upon which relief can be granted?

4. Did the Supreme Court of Missouri err in concluding that the case does not involve "state action" under the Fourteenth Amendment or action under color of state law under 42 U.S.C. §1983?

REASONS FOR DENYING THE WRIT

Respondent Curators submits that petitioner's request for the issuance of a writ of certiorari should be denied for the following reasons:

1. Petitioner's claim is moot and petitioner lacks standing.

Petitioner's Second Amended Petition, dismissed by the trial court (A59), contained two counts: Count I sought money damages of $3900, presumably under 42 U.S.C. §1983, for the alleged deprivation of petitioner's constitutional rights. Count II sought a declaratory judgment that the denial to petitioner of benefits under the Victor Wilson trust was a denial of her constitutional rights and a ruling by the court that the trust should be revised by substituting "students" or "individuals" for "boys".

The Second Amended Petition was filed on September 25, 1974 (A55). On that date petitioner was no longer a student at the University of Missouri at Kansas City ("UMKC"), having graduated with a law degree in the spring of 1974. Thus the claim asserted in petitioner's Count II was moot from the outset, and is now moot, under the decisions of this Court, *DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 174 (1975); *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and petitioner lacks standing to prosecute said claim, *Craig* v. *Boren, supra.*

The Supreme Court of Missouri stated that "the claim may well be moot under Missouri cases" (A34, footnote 7). It nevertheless proceeded to decide the case, relying on somewhat suspect authority[1] for the proposition that under Missouri law mootness does not preclude a decision where the question is of great public importance and involves public rights or interests which may readily recur (A34). That is not the law as decided by this Court; mootness is fatal to a case of this nature when prosecuted individually and not as a class action, *Board of School Commissioners of Indianapolis* v. *Jacobs* and other authorities, *supra.* Cf. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

Furthermore, even if petitioner were still a student at UMKC, to have standing she would have to be able to show that she herself has suffered a distinct and palpable injury that is likely to be redressed if the requested relief is granted, *Gladstone, Realtors* v. *Village of Bellwood*, ... U.S. ....., 99 S.Ct. 1601, 1608 (1979). In the case at bar, that requires not only establishing that the Victor Wilson trust is unconstitutionally discriminatory but also that its benefits should have been extended to females and, specifically, to petitioner. As noted, in her petition petitioner prayed that "students" or "individuals" be sub-

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1. Two of the three Missouri cases cited by the Court, *Triplett* v. *Grundy Electric Cooperative, Inc.*, 389 S.W.2d 401 (Mo.App., 1965), and *Lawyers' Association of St. Louis* v. *City of St. Louis*, 294 S.W.2d 676 (Mo.App., 1956), make reference to the rule in question but state that in neither had the case actually become moot. The third case cited, *Western Auto Supply Company* v. *Banner*, 288 S.W.2d 402 (Mo.App., 1956), finds the rule inapplicable in that case.

stituted for "boys" in the will. She alleged no grounds whatsoever in support of that obviously inappropriate remedy, and the claim for that relief has probably been abandoned.[2] Yet unless petitioner can show that the alleged unconstitutionality resulted in an injury peculiar to her or to a distinct group of which she is a part, she has no standing as to either count of her petition, *Gladstone, Realtors, supra.*

2. Petitioner's Count I fails to state a claim upon which relief can be granted.

The Supreme Court of Missouri, proceeding as noted despite mootness, held that the petition failed to state a claim for relief because there was no state action involved within the meaning of the Fourteenth Amendment (A36-A47). It said that petitioner's claim under 42 U.S.C. §1983 failed for the same reason (A48). It did not reach the other defenses to petitioner's claim for damages under 42 U.S.C. §1983.

While we believe that the determination of no state action was correct, as discussed *infra*, petitioner's Count I was properly dismissed in the trial court for other reasons as well, all of which the trial court ruled on (A59).

The only defendants in this case against whom petitioner could conceivably be claiming damages are The Curators of the University of Missouri, a public corporation under the statutes and constitution of Missouri, and Columbia Union National Bank & Trust Company, the trustee

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2. The opinion of the Missouri Court of Appeals, printed in petitioner's Appendix (A1-A25), became in effect a nullity when the case was transferred to the Missouri Supreme Court, which then heard the case de novo as if on original appeal, Rule 83.09, Mo. R.C.P. Even the Court of Appeals, however, turned down petitioner's claim for reformation of the will as "too drastic" a remedy (A23).

of the Victor Wilson trust. Charles B. Ratchford, then President of the University of Missouri, and James C. Olsen, then Chancellor of UMKC, were named as defendants but were never actually made parties or served with process. The Attorney General of Missouri is a party only because of the charitable trust involved. The other defendants were Victor Wilson's known and unknown heirs. The claim against Ratchford, Olsen and Curators is based on *respondeat superior* (¶12 of Pet., A56), which will not support an award of damages under §1983, *Monell* v. *Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Respondent Curators is the state university, in its incorporated and body politic form, §172.020, Revised Statutes of Missouri, 1969; Missouri Constitution of 1945, Article IX, §9(a). As an arm of the state, respondent Curators is not subject to suit under 42 U.S.C. §1983, *Gay Lib* v. *The University of Missouri,* 416 F.Supp. 1350 (W.D. Mo., 1976), reversed on other grounds, 558 F.2d 848 (C.A. 8, 1977); *Prostrollo* v. *University of South Dakota,* 507 F.2d 775 (C.A. 8, 1974), cert. den. 421 U.S. 952, 95 S.Ct. 1687, 44 L.Ed.2d 106 (1973); *Sellers* v. *Regents of University of California,* 432 F.2d 493, 500 (C.A. 9, 1970). Said another way, respondent Curators is not a municipality or other local governmental unit whose prior immunity under §1983 was stripped by *Monell* v. *Department of Social Services of City of New York, supra.*

Further, were it not immune from suit under §1983, when faced with a claim for a compensatory award respondent Curators is entitled to the good faith defense enunciated in *Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). See *Handverger* v. *Harvill,* 479 F.2d 513 (C.A. 9, 1973).

Petitioner's claim for damages against the trustee was also properly dismissed by the trial court. The trustee has done no more and no less than carry out the terms of Victor Wilson's will, as it was bound to do under the governing law, *Coleman* v. *Lill*, 191 S.W.2d 1018, 1020 (Mo.App., 1945); *Rapp* v. *St. Louis Union Trust Co.*, 229 S.W. 1105, 1106 (Mo.App., 1921). The will mandated the selection of males as recipients of the trust benefits, and as discussed more fully *infra* the trustee's giving effect to the will's provisions was private action beyond the reach of 42 U.S.C. §1983. But even were it otherwise, the trustee, acting in unchallenged good faith under a valid will, should certainly not be liable in damages. See *Sebastian* v. *United States*, 531 F.2d 900 (C.A. 8, 1976), cert. den. 429 U.S. 856, 97 S.Ct. 153, 50 L.Ed.2d 133; *Welsh* v. *Kinchla*, 577 F.2d 767 (C.A. 1, 1978); *Duchesne* v. *Sugarman*, 566 F.2d 817, 829-30 (C.A. 2, 1977), extending the defense of good faith to private individuals and institutions in a §1983 action for damages.

Further, petitioner's action was dismissed in the trial court for the reason, *inter alia*, that her Second Amended Petition failed to conform to Missouri Rule of Civil Procedure 55.05, which requires a "short and plain statement of the facts showing that the pleader is entitled to relief . . ." While the point was not reached by the Supreme Court of Missouri, we submit that the petition here does not plead facts sufficient to show that petitioner, apart from her sex, met the qualifications of the will for trust benefits: i.e., that she was "financially unable to obtain a University education" and that she possessed "unusual ability or talent" (quoting the will, A2-A3), and that she would have been among the "one or more" persons meeting said qualifications whom, aside from considerations of sex, the trustee would have selected for financial aid.

Finally, petitioner's claim for damages is deficient for the same reason as her lack of standing, discussed above: i.e., petitioner has not and cannot establish that, even were the trust unconstitutionally discriminatory, she or a group of which she is a member has sustained damage. The basic purpose of a §1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights, *Carey* v. *Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). If the will is not to be reformed retroactively to include females as beneficiaries, then petitioner has no claim for compensatory relief; and reformation of the will under the *cy pres* doctrine is rather obviously not an appropriate remedy in this case.

3. The Supreme Court of Missouri correctly determined that the case does not involve state action within the meaning of the Fourteenth Amendment.

Petitioner's claim is that she was denied the right to apply for and receive benefits from the Victor Wilson trust solely because of her sex, under circumstances amounting to action under color of state law (42 U.S.C. §1983) and state action under the Fourteenth Amendment. The Supreme Court of Missouri concluded that the discrimination on the basis of sex involved here resulted from the testator's own personal predilection; that his private trustee had the final duty and authority to select and approve the applicants for trust benefits; and that the involvement of UMKC in disseminating information about the scholarships, receiving and processing applications, and nominating potential recipients was not of such significance that "state action" results (A45-A47). To the extent that the Missouri court interpreted the will and defined the respective roles of the trustee and the other parties involved, it was performing the essentially state-law function of will construction, *Evans* v. *Abney*, 396 U.S. 435, 444, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

As petitioner concedes (5), this case involves a "purely private choice" which the State of Missouri was "in no way responsible for", quoting *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 (1978), interpreting *Evans* v. *Abney, supra.* Petitioner, however, contends that because a 1964 court decree ordered that references to a private university in the decedent's will be construed to mean UMKC with respect to the use of trust income (A56), state action in the Fourteenth Amendment sense is now involved.

In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), this Court said that "our holdings indicate that where the impetus for discrimination is private, the State must have 'significantly involved itself with invidious discriminations'." *Moose Lodge* involved the refusal of a private lodge, licensed and regulated by the state, to serve a Negro guest. The Court said that the state regulation, however detailed it might be in some particulars, did not in any way foster or encourage racial discrimination. Hence the state was not sufficiently implicated in the lodge's discriminatory policies to make the latter "state action" under the Equal Protection Clause of the Fourteenth Amendment. 407 U.S. 177-78.

In *Flagg Bros., Inc.* v. *Brooks, supra,* this Court stated that the action of a private person can give rise to a deprivation of a Fourteenth Amendment interest only if the action of the private person "may fairly be treated as that of the State itself", 98 S.Ct. 1734. The mere acquiescence of the state in a private action has never been held to convert the private action into state action, 98 S.Ct. 1737.

The reasoning of this Court in the above-cited cases supports the conclusion reached here by the Missouri Supreme Court. The decision to establish a scholarship fund

for boys was made by Victor Wilson when he executed his will. It became irrevocable when he died in 1948. Neither UMKC nor any other arm or agency of the State of Missouri can compel the trustee to violate the terms of the will. It is immaterial that UMKC assists in preliminary, nondiscretionary processes relative to trust applicants. The questions of law are whether or not it can be said that the state fosters and is significantly involved in the discrimination of which petitioner complains (*Moose Lodge*), and whether or not the decisions of the bank as trustee, reflecting in turn the testator's private choice, may fairly be treated as action of the state itself (*Flagg Bros.*). The answers to these questions are clear: UMKC had no involvement with and neither fosters nor discourages the limitation of trust benefits to males. The action of the testator and his trustee in making scholarship funds available to males and not females can in no sense be treated as action of the state. Therefore, we submit, the Supreme Court of Missouri correctly held that there was no state action involved under the Fourteenth Amendment and no claim for relief stated under 42 U.S.C. §1983.

CONCLUSION

For the reasons set forth above, Respondent Curators requests that the petition for writ of certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION OF RESPONDENT THE ATTORNEY GENERAL OF MISSOURI

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION OF RESPONDENT THE ATTORNEY GENERAL OF MISSOURI

The respondent John Ashcroft, Attorney General of Missouri, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Missouri in this case.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 576 S.W.2d 310 (Mo.Banc 1978) and appears at A26-53 in the appendix to the petition. The opinion of the Missouri Court of Appeals, Kansas City District, did not become a final decision and was never officially reported. This opinion appears at A1-25 in the appendix to the petition. The Order of the trial court will not

be published and appears at A60 in the appendix to the petition.

On page 2 of the petition the petitioner in reviewing the opinions below indicates that the Supreme Court of Missouri reinstated the judgment of the trial court holding that petitioner had not been subjected to unlawful discrimination. The respondent Attorney General respectfully disagrees with this contention. Instead, it is the view of this respondent that the trial court and the Supreme Court of Missouri properly found that there was not sufficient state action in this case. As a result, any issue as to discrimination was not passed upon by the Missouri courts and the resolution of this issue was not necessary to the decision.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether there is significant state action involved so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C., §1983, when a private individual establishes a charitable trust for scholarships for the benefit of "deserving boys" to attend a private university which later becomes public and the funds are disbursed under the will by a private trustee but the state university processes, and from a particular class of boys makes a "tentative award" to members of that class and forwards the names to the private trustee which are then "approved" by the trustee.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Is No Special or Important Reason for Granting This Writ.

The dispute in this case is primarily a factual one, i.e., do the facts in this particular case involve significant state action so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C.A., §1983, in the administration of the Victor Wilson Charitable Trust.

The contention of the petitioner on page 9 of her petition that this case affects every public college and university in the country that is involved to any degree in the administration of scholarships or trusts created or operated for the benefit of a limited group is overly broad. As was pointed out by the Supreme Court of Missouri, each case must hinge on its own facts in this area of the law and the involvement of the state may take many forms. Cf. *First National Bank of Kansas City* v. *Danforth*, 523 S.W.2d 808, 819 (Mo. 1975), *cert. den. sub nom., Sutt* v. *First National Bank of Kansas City*, 421 U.S. 992, 95 S.Ct. 1994, 44 L.Ed.2d 483 (1975); and *Lakeside Hospital Association* v. *First National Bank of Kansas City*, 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975). As a result, a determination of the issue presented by this case will not serve as any guidelines for other cases in which the facts may be different. In this regard, a factual situation such as that presented here is unlikely to occur frequently and the outcome of this case has no wide public important.

In summary, the issue in the present case is narrow and unique to its facts and it is submitted that no amount

of rhetoric should convert it into one warranting review on certiorari.

II. The Decision of the Supreme Court of Missouri Is Correct and Is Not in Conflict With Any Decision of This Court.

It has been indicated by this Court in various opinions that not every activity of the state constitutes state action in violation of the First and Fourteenth Amendments. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Evans* v. *Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Moose Lodge No. 107* v. *Irvis, et al.,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); and *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 47 (1974). It is only by sifting facts and weighing circumstances can a determination be made whether the reach of the Fourteenth Amendment extends to a particular case. *Burton* v. *Wilmington Parking Authority, supra.* In this regard, this Court has pointed out that private conduct abridging individual rights does no violence to the Equal Protection Clause "unless to some significant extent the state in any of its manifestations has been found to have become involved in it." *Burton,* 81 S.Ct. at 860. It is only when the state so far insinuates itself into a "position of interdependence that it becomes a joint participant in the challenged activity or where private conduct becomes so entwined with governmental policies that there is a violation." *Evans,* 86 S.Ct. at 488, and *Burton,* 81 S.Ct. at 862. The holdings of this Court further indicate that where "the impetus for the discrimination is private, the state must have significantly involved itself with invidious discriminations." *Moose Lodge,* 92 S.Ct. at 1971. Lastly, "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action

. . . so that the action . . . may be fairly treated as that of the state itself." *Jackson,* 95 S.Ct. at 453.

After discussing the foregoing principles, the Supreme Court of Missouri concluded in a majority opinion that by sifting all the facts and circumstances there was not significant state action involved in this case so as to be violative of the Equal Protection Clause of the Fourteenth Amendment or of the Civil Rights Act, 42 U.S.C.A., §1983 (A.45). It was pointed out that the testator was a private individual who established a private trust with his private funds for the benefit of deserving Kansas City "boys". In his will, he appointed a bank as private trustee and established a procedure by which the recipients of the trust would be selected. Therefore, under the terms of the will no public agency or state action was involved (A.45). In addition, the majority opinion reviewed the process and procedure for disbursing scholarship funds under the Victor Wilson Trust and concluded that the involvement of the University was not such which called into play the Fourteenth Amendment (A.46). It was emphasized that the agents of the University, under the will, do not have the power to reelect, or determine, or ultimately and finally determine those qualified boys who are awarded scholarship funds (A.46). Instead, this power resides in the private trustee. The private trustee has the power to approve as well as disapprove male applicants. The final and last act of selection is left to and is that of the private trustee (A.46). Further, the University has no discretion under the terms of the trust to forward the names of women to the private trustee and cannot request the trustee to violate the terms of the trust thus subjecting it to possible sanctions (A.47). As a result, in considering the allegations raised in the petition and on the motions to dismiss and the record

of this proceeding, the Supreme Court of Missouri by its majority opinion concluded that it did not believe that the participation by the agents of the University of Missouri was of such a significant extent in any of its manifestations or was so entwined with private conduct that state action resulted and the petition failed to state a claim (A.45-47). It is submitted that the majority opinion of the Supreme Court of Missouri is correct and in accordance with the teachings of this Court.

In connection with the above, the basic argument made by the petitioner in her petition is that the Supreme Court of Missouri should not have decided this case on a motion to dismiss, but that the case should have been remanded to the circuit court for trial. It is submitted that the petitioner's argument on this issue is not persuasive. In its decision, the majority opinion of the Supreme Court of Missouri properly states that its review of the dismissal of the petition allows the pleading its broadest intendment, treats all facts alleged as true, construes the allegations favorably to the plaintiff and determines whether the averments involve principles of substantive law (A.28). Subsequently, the majority opinion in its decision, sets forth the "process and procedure" for disbursing scholarship funds under the Victor Wilson Trust as garnered from the petition, answers to interrogatories and motions (A.37-38). This "process and procedure" as stated by the Court is certainly fair, accurate, favorable to the contentions of the petitioner and in accordance with the foregoing principles in reviewing the dismissal of a petition. In addition, there is authority for the proposition that a wide range of material may be considered in connection with a motion to dismiss for failure to state a claim upon which relief can be granted. Thus, illustrative of the type of evidence that has been used in a Rule 12(b)(6) motion

in federal courts are the following: admissions of counsel, affidavits, answers to interrogatories, collective bargaining agreements, contracts, copyrighted material, depositions, exhibits, hearsay, issues of a magazine, court judgments and orders, judicial notice of prior pleadings, leases, letters, oral argument, prior pleadings, and transcripts of prior court proceedings. See, Wright and Miller, *Federal Practice and Procedure*, §1364, p. 669. Also, as is suggested by the majority opinion in a footnote in its decision, it is conceivable that the trial court may have treated the motion to dismiss as one for summary judgment (A.33).

In any event, the petitioner's reliance on the decision of *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), in support of her argument is misplaced. It is important to note that in *Rhodes* the district court acted before answers were filed and without any evidence other than the copies of the proclamations issued by the respondent Rhodes and brief affidavits of the adjutant general and his assistant. In addition, the issue in *Rhodes* was *not* whether or not "state action" was involved, and whether or not a claim had been stated, but instead whether or not relief could be granted in that the complaints placed directly in issue whether or not the respondent Rhodes and his subordinates had acted in good faith both in proclaiming an emergency and as to the action taken to cope with the emergency so declared. Such is not the case at bar! On the other hand, in the case of *Jackson* v. *Metropolitan Edison Co.*, *supra*, as discussed in the majority opinion, the issue directly for consideration was whether or not a Pennsylvania utility company's termination of electric service to the plaintiff's home for the non-payment of bills constituted "state action". After granting certiorari, this court affirmed the decision of the district court in dismissing the plaintiff's complaint in a

motion to dismiss on the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action on which relief could be granted. *Jackson* v. *Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D. Penn. 1972). As a result, it is submitted that the petitioner's argument on this issue should not prevail.

Having concluded that the Supreme Court of Missouri by its majority opinion properly sustained the decision of the trial court in dismissing the complaint of the petitioner on a motion to dismiss, we will not discuss in detail her contention that this case should have been remanded to the circuit court for trial. However, in view of the majority opinion's careful and favorable consideration of the petitioner's complaint, we frankly do not believe that she could have achieved any better result in a full blown evidentiary hearing. It should also be noted that the petitioner has filed her complaint on three different occasions. Under such circumstances, it would seem reasonable that the respondents in this action should as a matter of law be able to raise a defense to her complaint to prevent the injustice of being held in court (with incidental subjection to discovery and other procedural vexations) when her complaint in law is a plain nullity and to finally end this litigation once and for all.

Lastly, having properly found that there was not sufficient "state action" in this case, any issue as to discrimination was not passed upon by the Supreme Court of Missouri as the resolution of this decision was not necessary to its decision. Also, in a footnote to the majority opinion, the Court indicated that the parties did not raise and no consideration was given to what effect, if any, the 1972 Amendments to Title IX of the Higher Education Act would have on this cause (A.48). Therefore, this Court's recent decision in *Cannon* v. *University of Chicago*,

47 U.S.L.W. 4549 (U.S. May 14, 1979), does not require any reviewability of this case.

In summary, it is respectfully submitted that the decision of the Supreme Court of Missouri is correct and is not in conflict with any decision of this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT, COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, TRUSTEE, IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

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VS.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT, COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, TRUSTEE, IN OPPOSITION

The Respondent, Columbia Union National Bank and Trust Company, Trustee, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Missouri in this case. That opinion is reported at 576 S.W.2d 310.

QUESTIONS PRESENTED

The Petitioner has submitted two questions for review (Pet. 3). Regrettably, the questions, as presented, distort the decision of the Court below and are argumentative.

The decision of the Supreme Court of Missouri below presents the following questions:

1. Whether the Court erred in concluding that the dismissal of Petitioner's Second Amended Petition was proper in that no state action inhered in the administration of the Victor Wilson Trust based upon alleged violations of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

2. Whether the Court, on the basis of the record before it, erred in upholding the dismissal of Petitioner's Second Amended Petition.

STATEMENT OF THE CASE

As a result of certain inaccuracies and improper references contained in Petitioner's Statement of Facts, Respondent Trustee finds it necessary to make a brief additional statement.

Petitioner correctly quotes the relevant provisions of Article VIII of the Last Will and Testament of Victor Wilson (Pet. 4-5). Under the terms of Article VIII, the Will limits the class of beneficiaries of the Trust to "deserving Kansas City, Missouri boys" to acquire an education at either Yale University or the University of Missouri at Kansas City ("UMKC"). There is no question in this case that females are not within the scope of the testator's designated beneficiaries.

The specific procedures involved in the award of funds by the Respondent Trustee from the Trust Fund were as found by the Supreme Court of Missouri as follows:

> "The 'process and precedure' for disbursing scholarship funds under the Victor Wilson Trust, as we garner it from the petition, answers to interrogatories, and the motions to dismiss, are as follows: (1) information concerning the Victor Wilson Scholarship is

> widely disseminated and appears in the under-graduate catalog, (2) general university applications are completed by an applicant and filed with the student financial aid office, (3) a financial statement is also completed, (4) the financial statement is processed by a nationally recognized agency, (5) the student financial aid office receives reports of academic standing of the applicant which must be roughly in the top quartile of entering and continuing male students, (6) when all files are completed they are forwarded to a professional staff within the University which reviews the eligible candidates, (7) the professional staff forwards the names of those persons within the class established by the trust and makes a 'tentative award' subject to the approval of the private trustee and the recommendation letters are forwarded to the trustee bank for 'approval' and (8) after such approval by the private trustee the University informs the male students of their awards. The University does not, however, recommend any female students." 576 S.W.2d 310, 317.

The Supreme Court of Missouri further found in characterizing the facts in this case:

> ". . . The final decision whether an individual is awarded a scholarship is that of the private trustee. The 'process and procedure' of the University has not so far 'insinuated itself' in the administration of the trust so that the action is that of the state nor can the challenged action be treated as ultimately that of the state.
>
> The university has no discretion under the terms of the trust to forward the names of women to the private trustee; the discretion exists only as to those members within the class who are recommended for final selection by the trustee. . . ." 576 S.W.2d 310, 321.

REASONS FOR DENYING THE WRIT

I

The Decision of the Supreme Court of Missouri Applies Established Principles Governing the Determination of the Existence of State Action, and Raises No Question Justifying the Issuance of the Writ of Certiorari

The rather pretentious tone of the Petition, in referring to the "nation's public colleges and universities" as needing guidance in this area (Pet. 12) belies the routine nature of the issue tendered for review, and the undeniably correct manner in which the Supreme Court of Missouri resolved that issue. Petitioner does no more here than to repeat the same arguments raised by her before the Supreme Court of Missouri and thoroughly considered by that Court. She argues only that the Supreme Court of Missouri was erroneously unpersuaded by her arguments. She does not assert that that Court significantly departed from the accepted and usual course of judicial proceedings. In short, Petitioner offers no persuasive assertion of any of the reasons for granting certiorari as enumerated in Rule 19(a) of the Revised Rules of this Court.

Petitioner alleged in her Second Amended Petition that the Victor Wilson Trust operated in violation of, *inter alia*, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. The capstone issues presented, as considered by the Court below, were whether "state action" was involved so as to invite an examination of the alleged discrimination under the Fourteenth Amendment [*The Civil Rights Cases*, 109 U.S. 3, 11 (1883)] and whether the administration of the Trust had been carried out "under color of law" equivalent to "state action"

for purposes of §1983 [*Adams* v. *So. Calif. First Nat'l Bank*, 492 F.2d 324, 329 (9th Cir. 1973)].

Simply put, this case presented an application of the "sifting facts and weighing circumstances" test which this Court enunciated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Presented to the Supreme Court of Missouri was the essential dichotomy which this Court early recognized in *The Civil Rights Cases, supra*, between discriminatory action by the state which is prohibited by the Equal Protection Clause of the Fourteenth Amendment and private conduct, "however discriminatory and wrongful," against which that Clause, as this Court has put it in *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947), "erects no shield."

Although it is axiomatic that "the great body of the law consists in drawing . . . lines" (*Schlesinger* v. *Wisconsin*, 270 U.S. 230, 241 (1926) [dissenting opinion]), *Burton* does not establish a bright line standard. However, the Supreme Court of Missouri did properly sift the relevant facts and circumstances as prescribed by the *Burton* test as applied by this Court to charitable trusts in *Evans* v. *Newton*, 382 U.S. 296, 299-300 (1966). See also, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Evans* v. *Abney*, 396 U.S. 435 (1970).

Under the Victor Wilson Trust, a trust fund has been created for deserving Kansas City, Missouri boys to acquire an education at either Yale University or UMKC. There is no issue in this case that the terms of this Will are not abundantly clear in limiting the right to income from this Trust to males as opposed to females. There is no allegation in Petitioner's Second Amended Petition that the Respondent Trustee is not administering the Trust precisely in accordance with its terms. Under those terms, the income of the Trust is to be used to assist one or

more boys living in Kansas City, Missouri and who possess unusual ability or talent and who are financially unable to obtain a university education to attend either Yale University or UMKC.

Petitioner, concededly, at the time the action was commenced was then a female law student at UMKC and, as such, was not within the class of beneficiaries delineated by the Will. A finding to the contrary would have required the Supreme Court of Missouri to determine not only that state action was involved so as to bring the case within the parameters of the Fourteenth Amendment and 42 U.S.C. §1983, but also that the limitation to males as opposed to females, within the context of this particular Will, is discriminatory.[1]

A finding that state action was involved here would have gone contrary to the established principle stated in *Burton* that individual invasion of individual rights is not the subject matter of the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra,* 721-722. As recognized by this Court in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173 (1972):

> "The Court has never held . . . that discrimination by an otherwise private party would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination,' *Reitman* v. *Mulkey,* 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

1. A plurality of this Court in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) held that sex was a suspect classification, but a majority of the Court has not come to that conclusion. See also, *Reed* v. *Reed,* 404 U.S. 71 (1971); *Caban* v. *Mohammed,* ..... U.S. ....., 47 L.W. 4462, 4467 (1979).

What the Respondent Trustee has consistently done is to carry out the intent of the testator, an intent clearly expressed within the four corners of the instrument, to provide funds from the income of the property held in trust for the education of boys residing in Kansas City, Missouri. The argument which the Petitioner makes before this Court that sexual discrimination proscribed by the Fourteenth Amendment is involved here is really tantamount to saying that all charitable trusts in which a trustee is required to distribute the funds of that trust only within certain limits results in unlawful discrimination. This is a contention as surprising as it is novel. There are numerous well-known charitable organizations, for instance, which limit membership based on sex. For example, the Bylaws of the United States Jaycees which limit membership to males does not infringe on constitutional rights of females. *Junior C. of C. of Rochester, Inc., N. Y.* v. *U. S. Jaycees, Tulsa, Okla.,* 495 F.2d 883 (10th Cir.), *cert. denied,* 419 U.S. 1026 (1974).

Many trusts involve limitations on the class of beneficiaries which can be benefited by the particular trust. See, for example, *Smith* v. *Moore,* 343 F.2d 594 (4th Cir. 1965) [clinic established by a trust to minister to "worthy white persons"]; *Shannon* v. *Eno,* 179 Atl. 479 (Conn. 1935) [gift for "worthy Protestant women over 60 years of age"]; *Averill* v. *Lewis,* 138 Atl. 815 (Conn. 1927) [trust for "white, Protestant Female Teachers"]; *Beardsley* v. *Bridgeport,* 3 Atl. 557 (Conn. 1886) [bequest for the benefit of "worthy, deserving, poor, white, American, Protestant Democratic widows and orphans residing in the town of Bridgeport, Connecticut"]; *Howard Sav. Institution* v. *Peep,* 170 A.2d 39 (N.J. 1961) [trust for American born,

Protestant Gentile boys]; *Moore* v. *Denver*, 292 P.2d 986 (Colo. 1956) [trust for benefit of "poor, white male orphans"]. Yet this Court has stated in *Evans* v. *Newton*, *supra*, 300, that:

> "If a testator wanted to leave a school or center for the use of one race only, and in no way implicated the State . . . we assume *arguendo* that no Constitutional difficulty would be encountered."

This Court has further recognized that, where the impetus for the discrimination is private (assuming that there is discrimination here for the sake of argument), the state must have "significantly involved itself with invidious discrimination" [*Reitman* v. *Mulkey*, *supra*, 380] in order for the discriminatory action to fall within the ambit of constitutional prohibitions.

The Supreme Court of Missouri found that Victor Wilson was not an agent of the state, but a private individual who had amassed a fortune and had a perfect right to divide his money to any person or organization he desired even if his choice of beneficiaries was limited. Not one cent of public money went into the Trust. The Trust was and is administered by a private Trustee. That Court specifically found that "[d]iscrimination on the basis of sex results from Mr. Wilson's personal predilection." 576 S.W.2d 310, 320.

The process for selecting beneficiaries of the Trust Fund was as set forth in the opinion of the Supreme Court of Missouri. It is evident from an examination of that process that the selection of students for approval by the Trustee is selection within the context of the limitation proscribed under Victor Wilson's Will; that is, a selection among Kansas City, Missouri boys who otherwise qualify under the terms of the Will. This does not imply

or mean that any state agency is acting to deny funds to female students, but only that the judges appointed by UMKC are selecting among those Kansas City, Missouri boys who apply. The prohibition against selecting females comes not from the UMKC judges, but rather from the clear terms of the Victor Wilson Trust. The ultimate authority for determining who receives funds resides with the Trustee. Under the terms of the instrument, applicants must be "approved by the Trustees of the said Fund." (sic) The Trustee is affirmatively directed, under the terms of the instrument, to "discontinue supporting any student failing to make satisfactory grades while attending either of said Universities." The function of the University is simply a ministerial one. It selects among the category of potential beneficiaries as defined by Victor Wilson. A list of otherwise acceptable male students is forwarded to the Trustee which must then decide to approve or disapprove any tentative award.

The judges appointed by UMKC may not consider female students because such students are not within the class of permissible income beneficiaries. In fact, a referral to the Trustee of the names of female students would be a futile act. The Will itself precludes the Trustee from awarding benefits to females. The key to a finding of "state action" is the participation of a state agency in effecting the discrimination itself. And here the discrimination, if any, emanates from the testator, a private individual who may dispose of his money and property as he wishes absent state action.

As such the facts of this case are distinguishable from those cases in which the trustee itself was a governmental body. For example, in *Evans* v. *Newton*, *supra*, Senator Bacon had left certain land in Macon, Georgia, to the "mayor and City Council of Macon, Georgia" in trust,

to be operated as a public park for "white persons only." This Court ruled that state action was involved since the trustee charged with the duty of carrying out the provisions of the trust was itself a subdivision of the state, and could not perform its duties under the trust without violating the Fourteenth Amendment. In fact the cases which have overturned discriminatory charitable grants have either involved appointment of a city or county as trustee of the discriminatory trust [*Evans* v. *Newton, supra*; *Pennsylvania* v. *Board of Directors of City Trust, supra*; *Commonwealth* v. *Brown*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); *LaFond* v. *Detroit*, 98 N.W.2d 530 (Mich. 1959)] or an attempt to use a court to force or compel discrimination by an unwilling trustee [*Sweet Briar Institute* v. *Button*, 280 F.Supp. 312 (W.D.Va. 1967); *Bank of Delaware* v. *Buckson*, 255 A.2d 710 (Del. Ch. 1969)].

State action, as found by the Supreme Court of Missouri, is simply not involved here in the Respondent Trustee's carrying out the clear directive of Article VIII of the Will of Victor Wilson. The "impetus" for the selection of males emanates from the Victor Wilson Trust, not from the ministerial act of UMKC in screening out candidates from the trust-designated class of "deserving Kansas City, Missouri boys".

II

The Supreme Court of Missouri Correctly Applied Established Standards of Review in Affirming the Trial Court's Dismissal of Petitioner's Second Amended Petition

The Petitioner complains not only that the Supreme Court of Missouri was wrong in its application of the

Burton principles in finding no state action, but also that the case was resolved on the basis of a motion to dismiss, without the production of evidence at trial (Pet. 10-11).

The process and procedure involved in the award of funds from the Trust, as set forth in the Court's opinion, was derived "from the petition, answers to interrogatories, and the motions to dismiss. . . ." 576 S.W.2d 310, 317. It is unclear to this Respondent on what additional facts Petitioner would seek to present evidence (Pet. 11). It certainly cannot be said that, in view of the Supreme Court of Missouri's recitation, the issues were found, as Petitioner claims, "without any evidence on the issue." Even Petitioner concedes that interrogatory answers were referred to (Pet. 10). The Supreme Court of Missouri made reference to the same type of evidence which has been referred to in rulings on motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Wright & Miller, *Federal Practice and Procedure*, Section 1364, p. 669.

Procedurally, the case was in a posture where considerably more "evidence" was before the Supreme Court of Missouri than was before this Court when it affirmed dismissals of complaints involving state action issues in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) and *Flagg Brothers, Inc.* v. *Brooks*, 98 S.Ct. 1729, 1738 (1978).

Scheuer v. *Rhodes*, 416 U.S. 232, 235 (1974), relied upon by Petitioner (Pet. 10-11), not only did not involve a state action question, but also involved motions to dismiss granted even before answers were filed. Even in *Scheuer*, this Court recognized that the case might be resolved on the basis of summary judgment and might not require a trial on the merits. 416 U.S. at 250.

CONCLUSION

The Petitioner presents no questions which are novel and important, none that has not heretofore been settled and resolved in a manner entirely consistent with the decisions of this Court, and none that suggests the necessity or desirability of re-examination by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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